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VOLUME 36 (2d Series)

Pages 1 to 140

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 72-656

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BARTELL BROADCASTING OF MISSOURI, INC., TO ACQUIRE LICENSE OF STATION KRCH-FM, ST. LOUIS, MO.	BALH-1608

JULY 19, 1972.

VALUE LINE SPECIAL SITUATIONS FUND, INC.
5 East 44th Street
New York, N.Y. 10017

GENTLEMEN: On July 19, 1972, the Commission granted the application of Bartell Broadcasting of Missouri, Inc. to acquire the license of radio Station KRCH-FM, St. Louis, Missouri (BALH-1608).

Bartell Broadcasting of Missouri, Inc. is a wholly owned subsidiary of Bartell Media Corporation, a publicly held corporation. Downe Communications, Inc., through its 38.85% interest, in Bartell Media Corporation, has *de facto* control of that corporation and, thus *de facto* control of Bartell Broadcasting of Missouri, Inc.

In considering the above application, the Commission noted that Value Line Special Situations Fund, Inc. voted 3.4% of Downe Communications, Inc. stock and 5.51% of Pacific and Southern Broadcasting Co., a multiple owner of broadcasting stations. These interests result in ownership by Value Line of broadcast stations in excess of the numbers permitted by our multiple ownership rules. In the Commissions Report and Order establishing a 3% "benchmark" for mutual fund holdings in broadcast licensees (Report and Order in Docket No. 15627, released June 17, 1968, 13 FCC 2d 357) the Commission stated:

> Individuals or entities who now have holdings in publicly-held corporate broadcast licensees which are in excess of our multiple ownership rules as here revised will be expected to bring such holdings into compliance with the revised rules over a reasonable period of time. In any event, at the end of [a] two-year period we shall, with the information then available, take whatever action appears appropriate in the circumstances, including any necessary steps aimed at divestiture.

Four years have expired since the issuance of the above Report and Order and, as stated, your holdings in broadcast licenses are in excess of those permitted under our amended rules (Sections 73.35, 73.240, 73.636). Therefore, you are hereby directed to make the necessary divestitures of your stock holdings in broadcast licensees (or their parent corporations) so that the Fund's holdings will be in full compliance with the Commission's Rules. You are requested to furnish the Commission with a statement of your actions in this regard within fifteen (15) days of the date of this letter.

Commissioner Hooks, not participating.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

109-004—72——1

F.C.C. 72-622

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BOB MCRANEY ENTERPRISES, INC., WEST POINT, MISS. For New Commercial FM Station	BPH-6762

JULY 12, 1972.

BOB MCRANEY ENTERPRISES, INC.,
% Mr. Bob McRaney, Sr., WROB Building,
West Point, Miss. 39773

GENTLEMEN: This is in reference to your application (File No. BPH-6762) for a construction permit for a new commercial FM station at West Point, Mississippi.

By Commission letter of April 5, 1972, you were advised that a question was raised under the duopoly rule with respect to whether your then-pending proposals for new FM stations at Amory and West Point, Mississippi, constituted an efficient utilization of the assigned frequencies. You were requested to submit any reasons why you believed the applications should be granted without hearing and to indicate whether you would prosecute the applications through the hearing process on any issues then obtaining in view of your response. You were further informed that one of these applications could be granted at that time, and that you could indicate which application you preferred.

In response to this letter, you indicated a preference for the Amory proposal and submitted reasons as to why the West Point application should also be granted without hearing. As you are aware, your application for Amory was granted on June 26, 1972. Furthermore, we have considered the reasons advanced by you in support of the West Point proposal, and believe these reasons, coupled with other factors noted below, also warrant the grant of this application without the necessity for a hearing to determine whether the proposed operation would be an efficient utilization of the assigned frequency.

Specifically, it is noted that both applications propose maximum effective radiated powers and the mounting of the FM antennas on the towers of your existing AM stations in Amory and West Point. An increase in antenna heights to the maximum levels of 300 feet would require increases in the heights of the AM towers. Inasmuch as full utilization of the heights of the existing towers has been proposed, it does not appear that antenna heights have been selected to prevent overlap of 1 mv/m signals. Furthermore, you indicate that if you were to increase your coverage at some later date, it would be to cover the western part of your county and a directional antenna could be employed with the main lobe directed toward this area. It appears that this could be accomplished with a simple directional antenna system,

and with maximum facilities, the area within the West Point 1 mv/m contour could be increased by approximately 60 percent without overlap with the Amory 1 mv/m contour (even with the Amory facility also operating with maximum height and power).

It is additionally noted that both stations could utilize maximum facilities, without the necessity of a directional antenna at West Point, if the West Point facility were to be moved only 4–5 miles to the south or southwest of the present site. Although you have not indicated whether such a move would be considered or even desirable at some future date, it is a theoretical possibility which could be accomplished and still meet mileage separation requirements with respect to existing stations. It is also noted that the channels assigned to Amory and West Point were assigned when the allocation plan was adopted in 1963 and that no party, other than yourself, has ever applied for them.

In view of the foregoing, IT IS ORDERED, That your application for a new commercial FM station at West Point, Mississippi, IS GRANTED.

Commissioner Robert E. Lee was absent, Commissioner Johnson dissented, and Commissioner Hooks did not participate.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72R-181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DAILY TELEGRAPH PRINTING CO. [WBTW (TV)], FLORENCE, S.C. For Construction Permit To Change Facilities	Docket No. 18650 File No. BPCT-4162

APPEARANCES

Alan C. Campbell and *Thomas H. Wall*, on behalf of Daily Telegraph Printing Company; *Charles O. Verrill, Jr.*, *George Blow* and *Robinson O. Everett*, on behalf of Triangle Telecasters, Inc.; *Robert A. Marmet* and *Gordon R. Malick*, on behalf of Cumberland Broadcasting Corporation; and *Jay L. Witkin* and *P. W. Valicenti*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 28, 1972; Released July 5, 1972)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER KESSLER DISSENTING WITH A STATEMENT.

1. This proceeding involves the application of Daily Telegraph Printing Company (Daily Telegraph), licensee of VHF television broadcast Station WBTW(TV), Florence, South Carolina, for authority to increase antenna height, move its transmitter site, and make certain other technical changes.[1] Hearing Examiner Chester F. Naumowicz, Jr., released an Initial Decision, FCC 70D-52, on December 7, 1970, in which he concluded that Daily Telegraph's application must be denied since a grant would impair the ability of UHF television broadcast Station WRDU, Durham, North Carolina, to improve its operation by increasing its off-the-air market in the Fayetteville, North Carolina, area, and further augment its audience through the possible acquisition of a prospective satellite station, WCCT, located in Fayetteville. Exceptions and briefs in support thereof were filed by

[1] The application was designated for hearing by Order, FCC 69-943, 19 FCC 2d 247, released September 2, 1969, under the following issues:

1. To determine whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether a grant of the application would serve the public interest, convenience and necessity.

Additionally, the Commission made Triangle Telecasters, Inc. (Triangle), licensee of UHF television broadcast Station WRDU, Durham, North Carolina, a party to the proceeding.

the parties.[2] Subsequently, after the execution of an affiliation agreement between National Broadcasting Company (NBC) and Triangle, Triangle and Daily Telegraph filed a joint petition to reopen the record for acceptance of stipulation, noting, *inter alia*, the recent affiliation agreement.[3]

2. The Review Board has considered the Initial Decision in light of the exceptions and briefs, its examination of the record, the arguments of the parties [4] and the recently filed petition. The stipulation properly notes certain current information which will be incorporated into this Decision to the extent indicated hereinafter. The execution of the NBC affiliation contract considerably narrows and, to some extent, alters the scope of inquiry under the UHF impact issue. Consequently, portions of the findings and conclusions in the Initial Decision are no longer relevant to our consideration or are no longer substantially complete and/or correct. However, to the extent possible, and except as modified herein and in the rulings on exceptions contained in the attached Appendix, the Examiner's findings of fact are adopted. Further, for the reasons hereinafter stated, the Board does not agree with the conclusions reached by the Examiner or with his ultimate recommendation. Our Decision will include a brief description of both WBTW and WRDU [5] detailing the nature of the present and proposed operations—and then proceed to a discussion of the impact which would be occasioned by grant of Daily Telegraph's application.

DAILY TELEGRAPH

3. Daily Telegraph currently operates VHF Station WBTW at Florence, South Carolina, from a transmitter site located 5.5 miles north-northeast of Florence and about 70 miles southwest of Fayetteville, North Carolina. The transmitter operates with maximum permissible authorized power (ERP) of 316 kw and at a height above average terrain (HAAT) of 790 feet. The applicant proposes to move its transmitter site approximately 24 miles, to a location 28 miles northeast of Florence and 52 miles southwest of Fayetteville; the proposal would increase the HAAT to 1960 feet; and the transmitter would operate with an ERP of 316 kw (0.5 degrees below the horizontal).

4. The modification proposed by Daily Telegraph would result in greater coverage to areas to the north, northeast and east of Florence; loss areas would occur in the area to the west of Florence. Specifically,

---

[2] Cumberland Broadcasting Corporation (Cumberland), permittee of UHF television broadcast Station WCCT, Fayetteville, North Carolina, was permitted to intervene in the proceeding by Order of the Hearing Examiner (FCC 69M–1422, released November 3, 1969). However, Cumberland did not file exceptions, nor did it participate in oral argument before the Review Board.

[3] The following pleadings were filed: (a) request for acceptance of stipulation and stipulation attached thereto, filed September 10, 1971, by Triangle and Daily Telegraph; (b) Broadcast Bureau's comments, filed September 14, 1971; and (c) response to (b), filed September 21, 1971, by Triangle. Additionally, the following were filed: (a) request for permission to refer to facts outside the hearing record, filed March 4, 1971, by Triangle; (b) Broadcast Bureau's comments, filed March 10, 1971; and (c) Daily Telegraph's comments, filed March 15, 1971.

[4] Oral argument was held before a panel of the Board on September 14, 1971.

[5] Although the UHF impact issue in this proceeding is framed to encompass consideration of all UHF activity in the proposed service, this Decision, for reasons which shall be discussed subsequently, will be limited to a consideration of the adverse effect of Daily Telegraph's proposed move upon the development of WRDU.

the proposed modification would result in the following gains and losses:

Population and area gaining and losing service from the WBTW proposal

Contour	Population	Area (square mile)
	Present	
Grade A	379,497	5,305
Grade B	739,261	10,620
	Proposed	
Grade A	781,320	11,012
Grade B	1,206,363	18,353
	Proposed Gain	
Grade A	412,345	5,836
Grade B	472,769	7,820
	Proposed Loss	
Grade A	10,522	219
Grade B	5,667	87
	Proposed Net Gain	
Grade A	401,823	5,617
Grade B	467,102	7,733

5. Within the gain area, WBTW would provide a third [6] Grade B service to 76,895 persons in an area of 2,050 square miles. Additionally, WBTW would provide a first Grade A service to 121,126 persons, residing in 2,014 square miles, a second Grade A service to 132,167 persons in 2,048 square miles; and a third Grade A service to 68,886 persons in 1,397 square miles. In contrast, the transmitter move would result in 8,834 persons in 188 square miles losing a second Grade A service, and 585 persons in 15.4 square miles losing a third Grade A service. In the area losing Grade A service, a minimum of one and a maximum of three other Grade A services would remain available. The entire area losing Grade B service from WBTW would retain a minimum of three and a maximum of seven existing Grade B services. The loss areas are not located near the city of Florence; all of Florence and its environs will continue to receive better than city-grade service from the proposed WBTW.

6. At the time Daily Telegraph acquired WBTW by transfer in April, 1968, the station was in a period of declining profits and faced with increasing competition from surrounding markets.[7] The transferor has strongly recommended that Daily Telegraph improve its competitive position in light of these circumstances. At present, Daily Telegraph is particularly concerned with the applications of three Charleston, South Carolina, stations, which are seeking to move in the direction of Florence on a joint candelabra antenna (Dockets Nos. 18569–18572). If these applications were to be granted, the Grade B

[6] Unless otherwise indicated, WCCT is considered in the service figures as an existing operation, even though no construction has been undertaken.

[7] In 1954, when WBTW went on the air, there were six other television services available in various portions of its service area; by 1970, the number of competing television services had increased to seventeen.

contours of the three VHF stations in Charleston, according to Daily Telegraph, would extend beyond Florence,[8] and their Grade B contours would overlap approximately 40% of the Grade B contour of WBTW.[9] WBTW has a full-time CBS network affiliation with a network hourly rate of $581.00. The proposed move of the Charleston stations, according to WBTW, would increase the coverage of the CBS affiliate in Charleston, thereby endangering WBTW's full-time affiliation with CBS. In any event, the station's financial posture has improved since Daily Telegraph acquired the facilities. As noted by the Examiner, from April 1, 1968, through the end of 1968, the station has a pre-tax profit of $91,500; in 1969, WBTW had a pre-tax profit of $653,359. This increase is reflective of an increase in both circulation and advertising.

7. Since WBTW has been operating at maximum power, its only apparent alternative for increasing coverage at its present location was to increase its tower height; however, informal FAA advice indicated that an increase in height at its present location would be inadvisable due to its proximity to the Florence Airport. Thus, Daily Telegraph began its search for an appropriate alternate site. Several possibilities appeared open to WBTW, but for various technical and economic reasons proved infeasible. WBTW could not move west of its present location because of the 190-mile separation requirement with Station WLOS–TV, Asheville, North Carolina; as mentioned above, FAA difficulties would be encountered at the present site; and, lastly, a move to the east would primarily result in additional Atlantic Ocean coverage. Thus, in the view of Daily Telegraph, a move to the northeast (towards Fayetteville) seemed to be the only reasonable means to increase coverage. The location of other CBS affiliates, as mentioned above, also played a role in WBTW's determination, since Daily Telegraph wishes to increase its amount of unduplicated CBS service.

WRDU

8. Triangle, as the third station in the Raleigh-Durham market, operates Station WRDU from a transmitter site approximately 5.4 miles west-southwest of Chapel Hill, North Carolina, 15 miles southwest of Durham, 25 miles west of Raleigh, and approximately 55 miles northwest of Fayetteville. WRDU operates with a directional antenna having a maximum ERP of 2483 kilowatts and a HAAT of 1040 feet. Triangle's service contours include the following areas and populations.

Contour	Population	Area (square miles)
Grade A	820,962	6,116
Grade B	1,527,002	11,179

[8] At present, only one other station provides Grade A service and two stations provide Grade B coverage to Florence.

[9] On April 23, 1971, the Initial Decision (FCC 71D–19) in the Charleston proceeding was released, proposing to deny the joint applications for a construction permit to operate from a common tower. Presently, the proceeding is pending before the Review Board upon exceptions to the Initial Decision.

At the present time, a minimum of one and a maximum of five Grade A signals are available within WRDU's Grade A contour, and a minimum of three and a maximum of ten Grade B signals are available within its Grade B contour.

9. WRDU has operated at a consistent loss since it commenced operation in November of 1968. For the year ending December 31, 1969, Triangle showed net sales of $76,804.60, an operating loss for the year of $487,785.85, and an accumulated debt of $560,397.45. The estimated deficit for the first four months of 1970 is $103,000; thus, the total deficit through April, 1970 (the time of the hearing), amounts to $663,397.45. The sales figures for the first four months of 1970, according to Triangle, represent an increase of slightly more than 100% ($54,674.00) over the comparable period of 1969.[10] Presently, Triangle is experiencing a net cash outflow of $20,000 per month.

10. Although WRDU is one of three stations in the Raleigh-Durham market, it was unable to obtain a full network affiliation until after the release of *In the Matter of Amendment of Section 73.658 of the Commission's Rules to Limit Television Stations' Access to the Programs of More Than One National Network*, FCC 71–322, 28 FCC 2d 169, 21 RR 2d 1638.[11] Subsequently, on August 30, 1971, NBC, the "unaffiliated network" [12] in the Raleigh-Durham market, signed an affiliation agreement with Triangle which calls for a network station rate of $100.00 per hour.[13]

11. Prior to this recent agreement, Channel 11 (WTVD), Durham, North Carolina, had a primary affiliation with CBS, as well as an arrangement to carry programs with NBC; and WRAL in Raleigh, North Carolina, had a full network affiliation with ABC. Consequently, from the time it initiated operation in 1968, WRDU had been able to obtain only the CBS and NBC programming which was not utilized by WTVD. Under this arrangement, Triangle was unable to announce to its audience in advance exactly what programming could be expected; when NBC programming was carried on WTVD on a delayed basis, CBS programs were generally not freed for use on WRDU; and because of Triangle's inability to acquire a substantial enough net weekly circulation and rating, it was unable to achieve a position where it could obtain any reimbursement from NBC for the programming it carried and but nominal sums from CBS.

12. However, WRDU was able to increase the number of people watching the station, even though total television viewership had declined in the market since early 1969. The record reflects that four ARB surveys have been conducted in the Raleigh-Durham market since WRDU commenced operation: these surveys reveal that WRDU's

[10] This does not reflect the profit and loss figures for two out of the four months, thereby rendering comparison with 1969 figures somewhat inexact.

[11] The rulemaking was granted upon petition of Triangle. Reconsideration granted in part and denied in part, 31 FCC 2d 87, 22 RR 2d 1732, released August 4, 1971. The thrust of the "one affiliation per station" rule is that the network which is without a primary affiliate in a market having three or more stations, must offer its evening programs, and weekend and holiday sports programs to a third station before it can present them over one of the two stations regularly affiliated with other networks.

[12] "Unaffiliated network" refers to a network not having a regularly affiliated station serving as the network's primary outlet for the presentation of its programs in the market, even though it may have other types of agreements or per-program arrangements.

[13] The contract runs for a one-year period with automatic renewals and a 90-day cancellation provision at the expiration of the first year. Additionally, by the terms of the contract, WRDU is required to pay network interconnection costs.

average prime time households' audience share has risen from 1.8% in February/March, 1969, to 3.2% in May, 1970.[14] [15]

13. The WBTW and the WRDU present and proposed contours overlap as follows:

Contour	Population	Percent	Area (Sq. mi.)	Percent
		Present		
Grade A	0		0	
Grade B	15,997	(1.05)	245	(2.19)
		Proposed		
Grade A	3,974	(0.48)	98	(1.60)
Grade B	259,770	(17.01)	2,368	(21.18)
		Proposed Increment		
Grade A	3,974	(0.48)	98	(1.60)
Grade B	243,773	(15.96)	2,123	(18.99)

14. The Grade A overlap area is located about 54 to 61 miles south-southwest of Durham and 45 to 59 miles southwest of Raleigh, and is generally rural in nature. One portion of the proposed Grade A overlap area (containing 19.3 square miles and 166 persons) presently receives Grade A service only from WRDU; the balance of the overlap area receives one or two Grade A services. WTVD, the CBS affiliate located in Raleigh-Durham, North Carolina, serves between 50–75% of the overlap area; WGHP–TV an ABC affiliate located in High Point, North Carolina, serves between 0–25% of the overlap area.[16]

15. A minimum of four Grade B services, including WRDU, are presently available within the entire Grade B overlap area,[17] and the greater part of the area receives five or more such services. Four Grade B services—WTVD, the CBS affiliate located in Raleigh-Durham; WGHP–TV, an ABC affiliate located in High Point, North Carolina; WRAL, the ABC affiliate located in Raleigh; and WECT, an NBC affiliate located in Wilmington, North Carolina—serve between 75–100% of the proposed additional Grade B overlap area between WBTW and WRDU. One Grade B service—WFMY–TV, a CBS affiliate located in Greensboro, North Carolina—serves between 25–50% of the proposed additional Grade B overlap area.[18] Six other Grade B services—WBTV, a CBS affiliate, WSOC–TV, an NBC affiliate, WCTU–TV, an independent UHF facility, and WCCB, an ABC affiliate (all located in Charlotte, North Carolina), as well as WITN–TV, an NBC affiliate located in Washington, North Carolina,

[14] In May of 1970, ARB reported 60% UHF penetration in the Raleigh-Durham Area of Dominant Influence (ADI) (Area of Dominant Influence (ADI) is an exclusive geographic area consisting of all counties in which the home market stations receive a preponderance of total viewing hours).

[15] Ernest Clay presented expert testimony on behalf of the applicant concerning the effect of WBTW's proposal on WRDU's prime time audience. He notes that WRDU's average prime time audience was 2,800 in February/March, 1969, and 2,900 a year later (a growth rate of 3.6%). As of November, 1970, the average prime time quarter-hour audience of WRDU was 5,000.

[16] If WCCT were to go into operation, it would serve between 25–50% of the Grade A overlap with a Grade A signal.

[17] The Grade B overlap area is located about 35 to 78 miles south-southwest of Durham and 25 to 77 miles southwest of Raleigh. (The area is difficult to characterize because it is a mix of small towns and rural areas.)

[18] If WCCT were to commence operation, it would serve between 25–50% of this area also.

and WSJS–TV, an NBC affiliate located in Winston-Salem, North Carolina, serve between 0–25% of the proposed additional Grade B overlap area.

16. Triangle's difficulty in building sales has stemmed, in large measure, from its low ratings, which it is attempting to improve. Aside from its endeavor to acquire a network affiliation, WRDU has concentrated its primary efforts on boosting sales in Raleigh-Durham. Additionally, WRDU has made some minor attempt to build viewership in Fayetteville, which it feels, as a rapidly growing community within its Grade B contour,[19] could be an important part of its market.[20] However, WRDU has not yet generated any real sales activity there; for example, in July of 1970, orders for Fayetteville sales totalled only $2,268.00. Even though the respondent covers Fayetteville with a Grade B signal, and prior to its recent affiliation agreement provided some unduplicated off-the-air CBS programming, it had no off-the-air circulation in Cumberland County. Rather, the only circulation attributable to it was that which resulted from carriage on the Fayetteville CATV system; until very recently, WRDU, operating with a dual network arrangement, received non-duplication protection for its CBS programming. Due to the affiliation agreement, however, WRDU has lost any competitive advantage which it may have formerly possessed. At present, WECT, an NBC affiliate located in Wilmington, North Carolina, covers Fayetteville with a Grade A signal;[21] thus, WECT not only covers Fayetteville with a stronger off-the-air signal than WRDU, but it also receives priority on the CATV system for NBC programming.[22]

17. As another means for enhancing its coverage in Cumberland County, Triangle proposed to utilize WCCT in Fayetteville as a satellite of WRDU.[23] The purchase agreement whereby Triangle expected to acquire control of WCCT is contingent upon the ability of WRDU to obtain rebroadcasting consent, which NBC has refused to grant. No final action has been taken with respect to any of the three pending applications, nor has any construction commenced. In this connection, WRDU stated at oral argument that it could not proceed with the construction of WCCT in the absence of network clearance. The record testimony further indicates that the only economically

[19] WRDU's Grade A contour approaches to within 10 miles of Fayetteville and its Grade B contour encompasses all of Fayetteville. Fayetteville is located in Cumberland County which is the second largest county in the Raleigh-Durham ADI; there is 73% UHF set penetration in the county.

[20] While Fayette has no local television station, four facilities are available to it; moreover, it also receives service from Fayetteville Cablevision which serves a total of 10,746 homes. The CATV system carries the signals of nine stations, in addition to those of WRDU and WBTW.

[21] WBTW's proposed city-grade contour would encompass the southwestern portion of Fayetteville which includes 6,265 persons, or 13.3% of the total city population. WBTW's proposed Grade A contour would penetrate Cumberland County in which Fayetteville is located (for the first time), thereby including 70% of the county's area and all of Fayetteville; its proposed Grade B contour would encompass all Cumberland County.

[22] See Section 76.91 of the Commission's Rules. (Formerly Section 74.1103.)

[23] Cumberland, permittee of UHF broadcast Station WCCT, was granted a construction permit for Channel 40, Fayetteville, in February of 1967 (File No. BPCT–3715). Presently, three applications concerning WCCT are pending before the Commission: (1) a request for extension of time within which to complete construction (File No. BMPCT–6612); (2) an application for transfer of control of Cumberland from the original four stockholders to Jackson F. Lee (File No. BTC–5716); and (3) an application for transfer of control whereby Triangle would acquire 75% of the stock of WCCT (File No. BTC–6074).

feasible means for putting WCCT on the air would be to operate it as a satellite of WRDU.[24]

CONCLUSIONS

18. The Board recently had occasion to review the Commission's UHF policy in the course of applying it to a proposal to modify the operation of a VHF station serving Lynchburg, Virginia.[25] Reference is made to language of the Court of Appeals for the District of Columbia in *WLVA, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d ——, 23 RR 2d 2081 (1972), where the policy was described in the following words:

> . . . [T]he Commission's long-standing UHF protection policy . . . arose out of the Commission's realization that development of a viable system of UHF broadcasting, which was deemed essential in light of the limited number of available VHF channels, could never become a reality unless and until these UHF stations were offered some sort of protection against their generally more powerful VHF competitors. . . . Thus, the Commission devised its UHF preference doctrine as a means to foster optimum conditions for the growth of UHF television. The substance of this doctrine is manifested in the Commission's consistent refusal to grant applications of VHF stations to enlarge [or, as here, change] their coverage areas when the effect would be detrimental to present or prospective UHF development. . . . Thus, in an effort to preserve a realistic potential of UHF growth, the Commission has made a judgment that where proposed VHF expansion is likely seriously to jeopardize the development of UHF broadcasting, the 'paramount policy of fostering UHF service would more than offset the policy of encouraging VHF stations to provide the best possible service to the largest number of persons. . . .' —— U.S. App. D.C. at ——, —— F.2d at ——, 23 RR 2d at 2104.

However, the Board went on to recognize that, "where only a minimal impact on UHF has been shown, Commission policy does not require us to deny applications to improve the operation of an existing VHF station, especially where 'substantial service benefit[s]' would be achieved by a grant of the VHF application," citing *Cosmos Broadcasting Corp.*, 21 FCC 2d 729, 733, 18 RR 2d 536, 543 (1970), remanded on other grounds FCC 71–325, 28 FCC 2d 630 (1971). The same views were earlier expressed by the Commission in a somewhat different context in *Atlantic Telecasting Corp.* (*WECT*), 3 FCC 2d 442, 7 RR 2d 297 (1966), affirmed *sub nom. Lee* v. *FCC*, 126 U.S. App. D.C. 45, 374 F.2d 259, 8 RR 2d 2111 (1967), where the Commission allowed a VHF station to change its facilities in such a way as to increase from Grade B to Grade A its service to Fayetteville, North Carolina, despite the objection of an applicant for the UHF channel allocated to Fayetteville.[26] There the Commission observed:

> . . . Certainly the unsupported conclusion that any improvement of the service contours of a VHF station in an area to which a UHF channel is allocated is, per se, fatal to the prospects for successful UHF operation is not warranted. Such a view would severely restrict the Commission's ability to authorize improvements in the facilities of VHF stations because there are few areas in the United States to which no UHF channels are allocated.

While the question being decided in *Atlantic* was whether enough facts had been alleged to warrant a hearing, the language used con-

[24] The principal stockholder of Triangle, Robinson Everett, estimates that it would cost $100,000.00 to build the satellite and $40,000.00 per year to operate it. Robinson, jointly with his parents, owns more than 64% of the issued and outstanding stock of WRDU; the stockholders have invested substantial sums in addition to their original commitments in order to keep WRDU operative.

[25] *WLVA, Incorporated*, 72R–144, released May 26, 1972, —— FCC 2d ——.

stitutes a clear recognition by the Commission that there are limitations to the UHF protection policy. For a recent discussion of the Commission's UHF impact policy, see *WCOV, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F.2d —— (1972).

19. The UHF impact issue in this proceeding is framed to encompass consideration of all UHF activity in the overlap area. However, evidence adduced has been confined to the potential effect of a grant of WBTW's application on WRDU and the proposed WCCT. Our attention will be directed first to WRDU, since the question of impact on this station was the major consideration throughout the proceeding. In this regard the Board notes that WRDU faces a problem similar to that faced by the UHF permittee in *WLVA, Incorporated, supra;* it must acquire a significant viewing audience in its principal communities of Raleigh and Durham in order to achieve financial security. However, the instant case differs in one essential respect from *WLVA, Incorporated, supra.* Operating as proposed, WBTW will not provide service to Raleigh or Durham, and in no sense will it compete against WRDU for viewing audience in the latter's principal communities.

20. WRDU's continued existence as a viable UHF television service is jeopardized because of its competitive disability *vis-a-vis* WRAL and WTVD in its principal communities, Raleigh and Durham. The competitive imbalance between the three stations in the market is strikingly reflected by the ratings attributed to WRDU; its average prime-time household audience share was a scant 3.2% in May, 1970, as compared to 48.2% for WRAL and 48.6% for WTVD for the same period of time. Whether or not these ratings stem from WRDU's prior lack of network affiliation cannot be determined on the basis of the record established in this proceeding. Presumably, with a full-time affiliation, however, WRDU will be in a better position to redress the competitive imbalance which has existed in the Raleigh-Durham market. WRDU has admitted that its financial difficulties have been primarily attributable to its lack of full network affiliation, and it conceded on the record that the impact of WBTW's proposed move would be substantially lessened if it, WRDU, were to become an NBC affiliate and, thus, no longer in direct network competition with Station WBTW. As pointed out by the Broadcast Bureau at oral argument, the recent affiliation agreement gives WRDU a network hourly rate from NBC, which it did not previously have. In addition, it gives WRDU the ability to show a fixed program schedule to its advertisers and viewers for the first time, and, since the people in Raleigh and Durham will now be able to receive NBC programming off-the-air only from a UHF station, the affiliation should act as a stimulus to UHF development in the area.[27] Finally, and more importantly, by virtue of this contract, WRDU will no longer have to compete for CBS programming with either WTVD, or, in the event of a grant,

[26] See footnote 23, *supra.* This is the channel now assigned to WCCT.

[27] The Board cannot, as Triangle urges, predicate a finding of adverse impact on the mere possibility that NBC may exercise the cancellation clause in the affiliation contract after one year has elapsed. There is no reasonable ground for inferring that a grant of WBTW's application would trigger such cancellation. Thus, the situation is entirely different from that which prevailed in *WLVA, Incorporated, supra.*

with WBTW. While we cannot, on the basis of the record evidence, conclude with any certainty that the recently obtained NBC affiliation will assure WRDU of success in competition with the two VHF stations located in Raleigh and Durham, it is clear that the outcome insofar as WRDU's efforts in the principal cities is concerned is unrelated to a grant or denial of WBTW's application. WRDU's prospects for survival and economic viability rest with its ability to compete with WRAL and WTVD in its principal communities.

21. There is one other aspect of the instant situation which requires discussion. Excluding for now the special problem in Fayetteville, which will be discussed *infra*, the record shows that in the area outside Raleigh-Durham there will be a substantial increase in the Grade B overlap of WBTW and WRDU. The Grade B overlap area [28] already receives a plethora of service, both in terms of number and network affiliation; [29] grant of WBTW's application, therefore, will result in merely an intrusion of one more signal into a web of established network competition. More importantly, most of the increased Grade B overlap area is served by WECT, the Wilmington, North Carolina, NBC affiliated station, and portions of it are served by other NBC affiliated stations. We do not see how WBTW's signal will perceptibly add to WRDU's difficulties since WBTW and WRDU are no longer in direct network competition with each other; there is simply no basis for concluding that any increase in ratings or national or regional sales accruing to WBTW as a result of this proposal will come at the expense of WRDU.

22. Therefore, in this respect, too, the instant case is significantly different from *WLVA, Incorporated, supra*, for there the newly intruding VHF signal had the same network affiliation as the complaining UHF, which had recently improved its own operating characteristics to the point where it could hope to bring its network service to significant areas and populations. These areas and populations would largely have been duplicated by the VHF station operating as proposed, and, the Board found, there was danger of the UHF station losing its network affiliation. In the case now at hand, the Florence station will not be competing with the WRDU for audience for NBC programming, because WBTW is a CBS affiliate.

23. Considerable emphasis was placed by WRDU on the argument that a grant of WBTW's application would have an adverse effect on television service in Fayetteville, both in terms of the local satellite, WCCT, and from WRDU off-the-air. At the outset, it should be emphasized that the success or failure of the satellite operation is in no way related to the denial or grant of WBTW's application. WBTW's proposal would not directly affect WCCT because WBTW is a primary affiliate of CBS and WCCT, if operated as a satellite of WRDU, would be derivatively affiliated with NBC. As such, WCCT would be in direct competition with WECT which provides Fayetteville with a

[28] Significantly, in the small Grade A overlap area—3,974 (0.48%) population and 98.1 (1.60%) square miles—WRDU will be the only primary NBC affiliate; its competition in that area will range from one to two other existing Grade A services.
[29] See paragraph 15, *supra*.

Grade A signal. Moreover, the satellite proposal (WRDU's purchase agreement) is contingent upon obtaining NBC network consent and NBC has refused to give rebroadcasting consent. Further, it is unlikely that NBC would be willing to grant such rights to the detriment of its primary affiliation with WECT. Moreover, even if WRDU were to obtain rebroadcasting consent, it is not clear that the satellite proposal could be effectuated. WRDU suffers from substantial accumulated deficit, and the satellite would require an estimated $140,000.00 expenditure for construction and first-year operating costs. Under these circumstances, we must conclude that the utilization of WCCT as a satellite is not a feasible proposal, even without WBTW operating as proposed, and therefore that the move by WBTW could have no adverse effect in this regard.

24. Aside from the WCCT satellite proposal, the Review Board is of the view that there is no real potential for WRDU to develop a significant audience in Fayetteville or Cumberland County. Although WRDU has made some small effort to generate sales in Fayetteville, it has been unsuccessful, having no off-the-air net weekly circulation in all of Cumberland County. Moreover, the NBC affiliation recently obtained by WRDU is not likely to improve its prospects for obtaining viewers in Fayetteville since WRDU places a Grade B signal over that community, whereas, as already noted, WECT, the NBC affiliate in Wilmington, places a Grade A signal over Fayetteville. Fayetteville Cablevision carries the signals of eleven stations (including WRDU, WECT, and WBTW); therefore, as found by the Hearing Examiner, a majority of the residents of Fayetteville are not dependent upon the quality of off-the-air signals; and, as previously indicated, WECT has priority on the cable for NBC network programming. Thus, WRDU is in a disadvantageous competitive situation with another NBC affiliate for both on and off-the-air audience. Further, in addition to the stations carried by the CATV system, WRDU must compete for non-network audiences with WTVD, a CBS affiliate which provides predicted city-grade service to Fayetteville; and WRAL, an ABC affiliate which provides Grade B service to Fayetteville. In view of this competitive situation, we find it highly unlikely that WRDU could develop an untapped audience without a satellite, which would entitle its programs to exclusivity on the CATV system, and, therefore, we cannot conclude that the extension or enhancement of WBTW's signal will, in actuality, contribute to WRDU's financial and ratings difficulties. *Cf. VHF Channel Assignment at Mount Vernon, Illinois*, FCC 69–1209, 17 RR 2d 1620, reconsideration denied 22 FCC 2d 222, 18 RR 2d 1625, affirmed *sub nom. Plains Television Corp.* v. *FCC*, 21 RR 2d 2014 (U.S. App. D.C., 1971). Finally, there is no indication of any other incipient UHF interest or activity in Cumberland County.[30]

[30] Although the Broadcast Bureau suggested at oral argument that grant of Daily Telegraph's application might foreclose other UHF development in Fayetteville, it is the Board's view that the prospects for any such development are too speculative to affect our determination. Our view is buttressed by the Examiner's uncontroverted findings that UHF construction permits in Florence and Raleigh have been abandoned without construction, and that there is no showing of any further interest or of an apparent opportunity in the area.

In view of that fact that the area receives an abundance of service, both on cable and off-the-air, prospects for any such development appear doubtful.[31] In short, there is no reasonable likelihood that the proposed operation would have an adverse impact on UHF development in Cumberland County (including that of WRDU), because there does not appear to be any likelihood of such development in the foreseeable future. See *VHF Channel Assignment at Mount Vernon, Illinois, supra.*

25. As indicated above, the Board is of the view that a grant of Daily Telegraph's application would, at the most, occasion only minimal, if not highly conjectural, UHF impact; on the other hand, while such a grant would not provide extraordinary public interest benefits, it would result in definite and significant benefits. Daily Telegraph's proposal would clearly result in a more efficient use of its facilities since the viewing public would receive expanded service. Specifically, a grant of the application would result in a net gain in service to 401,823 persons in 5,617 square miles within the proposed Grade A contour, and a net gain of 467,102 persons in 7,733 square miles within the proposed Grade B contour. Within the gain area, WBTW would provide a third Grade B service to 76,895 persons in an area of 2,050 square miles. Additionally, WBTW would provide a first Grade A service to 121,126 persons, residing in 2,014 square miles; [32] a second Grade A service to 132,167 persons in 2,048 square miles; and a third Grade A service to 68,886 persons in 1,397 square miles. In sum, the WBTW proposal would result in significant service gains without causing any appreciable adverse effect on WRDU. Under these circumstances, grant of Daily Telegraph's application is warranted.

26. Accordingly, IT IS ORDERED, That the request for permission to refer to facts outside the hearing record, filed March 4, 1971, by Triangle Telecasters, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

27. IT IS FURTHER ORDERED, That the request for acceptance of stipulation, filed September 10, 1971, by Daily Telegraph Printing Company and Triangle Telecasters, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

28. IT IS FURTHER ORDERED, That the application of Daily Telegraph Printing Company (BPCT–4162) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

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[31] This view is supported by the testimony of Jackson F. Lee, principal of WCCT, who indicated that the only feasible means for putting WCCT on the air would be as a satellite, rather than as an independent operation.

[32] Compare *Triangle Publications, Inc.* (*WNHC–TV*), 37 FCC 307, 3 RR 2d 37 (1964), in which the Commission discussed the significance of the potential loss of a first Grade A signal.

APPENDIX

Rulings on Exceptions of Daily Telegraph Printing Company to Initial Decision

Exception No.	*Ruling*
1	*Granted in substance.* Although a substantial area south and west of Wilmington, North Carolina, will receive its first Grade B CBS service as a result of a grant of Daily Telegraph's application, the precise areas and populations were not established by the applicant.
2	*Granted.* See footnote 2 of this Decision.
3, 22	*Denied,* as not decisionally significant. See paragraph 23 of this Decision.
4	*Granted* to the extent indicated in paragraph 13 and *denied* in all other respects as not decisionally significant.
5	*Granted* in substance. See paragraph 15 of this Decision.
6	*Granted* in substance. See paragraph 14 of this Decision.
7	*Granted.* See paragraph 14 of this Decision.
8	*Denied.* The Examiner's findings accurately and adequately reflect the record.
9	*Granted.* See paragraph 9 of this Decision.
10	*Granted* in substance. See paragraph 20 of this Decision.
11, 43	*Denied.* Daily Telegraph's exception is based upon a misreading of the complete paragraphs cited.
12, 13, 15, 16, 20, 24, 25, 27, 35, 39	*Denied.* The exception is moot since it is directed to the facts as they existed prior to the August 30, 1971, affiliation agreement between Triangle Telecasters, Inc. and NBC.
14	*Granted.* See paragraph 20 of this Decision.
17	*Granted.* The finding is not supported by the record. See paragraph 23 of this Decision.
18, 31, 37	*Denied.* The findings requested are not decisionally significant.
19	*Granted.* See paragraph 24 of this Decision.
21	*Granted.* WRDU proposed a satellite operation at Fayetteville, see Sections 74.735 and 74.1103 of the Commission's Rules.
23	*Denied.* The material cited by the exceptor does not establish a substantial community of interest.
26, 40, 44, 46	*Granted* in substance for the reasons stated in this Decision.
28	*Granted* to the extent indicated in paragraph 7 of this Decision and *denied* in all other respects.
29	*Denied.* The findings are not beyond the scope of the designated issues.
30, 45	*Granted* to the extent indicated in paragraph 6 of this Decision and *denied* in all other respects as not decisionally significant.
32, 36	*Granted* to the extent and for the reasons stated in paragraph 23 of this Decision and elsewhere in the rulings on exceptions.
33, 38, 42	*Granted* to the extent and for the reasons stated in this Decision and *denied* in all other respects as not decisionally significant.
34	*Denied.* The testimony of Ernest Clay can readily be discounted. First, as noted by Triangle in its request for permission to refer to facts outside the hearing record, the November 1970 ARB sweep reveals that WRDU has a (Prime Time Average Quarter Hour Audience (PTAQA)) of 5,000. This current figure clearly discredits Clay's computation whereby he predicts that WRDU would increase its PTAQA from 2900 in February/March 1970 to 5300 in 1975. Secondly, the

Exception No.	*Ruling*
	method of analysis does not take network affiliation into account. Thus, Clay simply assumed that all stations in the Raleigh-Durham market would experience an identical loss in audience share because of the WBTW move, without giving consideration to network competition.
41	*Denied.* For the reasons stated in this Decision we do not believe that WRDU has met its burden.
47	*Denied.* See *South Carolina Educational Television Commission*, 18 FCC 2d 328, 16 RR 2d 725 (1969).

RULINGS ON EXCEPTIONS OF TRIANGLE TELECASTERS, INC., TO INITIAL DECISION

1	*Granted* to the extent indicated in paragraph 5 of this Decision and *denied* in all other respects as not decisionally significant.
2	*Granted* to the extent indicated in paragraph 9 of this Decision and *denied* in all other respects as not decisionally significant.
3	*Granted.* See Sections 74.735 and 74.1103 of the Commission's Rules.
4	*Granted* to the extent indicated in the Decision and *denied* in all other respects as not supported by the record.
5	*Denied* as not decisionally significant.
6	*Denied.* See paragraphs 18–24 of this Decision.

RULINGS ON EXCEPTIONS OF BROADCAST BUREAU TO INITIAL DECISION*

Exception No.	*Ruling*
1, 5, 6, 8, 9, 25	*Granted* to the extent indicated in this Decision and elsewhere in the rulings on exceptions and *denied* in all other respects as not being of decisional significance.
2, 4, 13, 18, 19, 20, 23, 24.	*Denied.* The Examiner's findings accurately and adequately reflect the record. The additional matter which the Broadcast Bureau seeks to incorporate is of no decisional significance.
3, 10, 14, 15, 17	*Denied.* The Examiner's findings accurately and adequately reflect the record.
7, 12	*Granted.*
11	*Granted* in part and *denied* in part. See paragraph 15 of this Decision.
16	*Denied.* The exception is moot since it is directed to the facts as they existed prior to the August 30, 1971, affiliation agreement between Triangle Telecasters, Inc. and NBC.
21	*Granted* in substance.
22	*Denied.* The Board agrees with the Examiner's finding that the signals of stations carrying network programs are now available off-the-air as well as on CATV; the remaining portions of the exception are either moot or of no decisional significance.
26	*Denied* for the reasons stated in paragraph 20 of this Decision.

*The Board is constrained to point out that many of the Bureau's exceptions do not comply with the requirement of particularity expressed in Commission Rule 1.277(a). The Bureau's practice of submitting several pages of its proposed findings and/or conclusions in lieu of those of the Examiner under the heading of an exception serves only to place upon the Board an administrative and adjudicatory burden of sentence-by-sentence rulings not contemplated by the Commission's Rules. In such circumstances it is impossible to determine to what exception is actually being taken without independently comparing large portions of the Initial Decision with the proposal and the record. See *Dolph-Pettey Broadcasting Co.*, 35 FCC 538, 1 RR 2d 347 (1963). Although there is ample precedent to support denial of these exceptions for failure to comply with Rule 1.277 (see, *e.g.*, *Ponce Broadcasting Corp.*, 38 FCC 441, 4 RR 2d 606 (1965)), we have endeavored to pass upon each on its merits. However, we strongly discourage such practice. See *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 4 RR 2d 375 (1965), reaffirmed *sub nom. Syracuse Television, Inc.*, 10 FCC 2d 642, 11 RR 2d 817 (1967); *KFPW Broadcasting Company*, 26 FCC 2d 723, 20 RR 2d 912 (1970); *Thornell Barnes Co.* v. *Illinois Bell Telephone Co.*, 1 FCC 2d 1247 (1965).

109-004—72——2

DISSENTING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

1. In my view, the majority opinion here—if permitted to stand—will make history of the demise of the overriding and paramount impact of the Commission's UHF protective policy except where there is substantial UHF impact in the critical area of the U's principal city,[1] and such substantial UHF impact in the principal city would likely result in the demise of the UHF station. The latest expression of Commission opinion on its long-standing UHF protection policy is set forth in its Report and Order, in *Mount Vernon*, 17 RR 2d 1621 (1969), and in its Memorandum Opinion and Order denying a petition for reconsideration, 22 FCC 2d 222 (1970), affirmed *Plains Television Corporation*, 440 F.2d 276 (1971). In those opinions, the Commission did not reverse its UHF protective policy by declaring that its policy of encouraging television VHF broadcast stations to operate with maximum facilities is now paramount in all predominant VHF reception areas which also have cable TV facilities; nor did it declare a reversal of its long-standing protective UHF policy except to the limited extent of the U's principal city. Without question, this is the effect of the majority opinion here.

2. Absent some expression of opinion by the Commission indicating that changed circumstances relating to cable TV require a reversal of its UHF protective policy, I cannot join in either the analysis of the facts or the ultimate conclusion reached by the majority. Obviously, this holding by the majority has enormous implications which extend beyond the confines of this case; it has nationwide implications relating to the impact of cable TV; it also has an enormous impact on UHFs' opportunity to develop national and regional advertising revenues to provide the financial resources necessary to support its non-network and news programs, particularly, where as here, the UHF station has already expended the investment in technical equipment necessary to provide wide area coverage in order to compete with the two dominant VHF stations in the Raleigh-Durham market which includes Fayetteville and Cumberland County. The Commission has long recognized that UHF television stations must be accorded reasonable opportunity to develop financial resources necessary to support such programs because they cannot do so with revenues derived exclusively from local businesses. It may affect other recent steps taken by the Commission in an effort to improve the tuning of UHF receivers [2] which ultimately may require greater public investment in all-channel receivers from a nationwide standpoint. In short, the majority view here extends way beyond this Board's jurisdiction, and constitutes a change of Commission policy irrespective of whether the prescience of the majority opinion may be considered as a desirable change or reversal of policy.

3. Turning now to the Commission's existing policy, the most recent expression of its views, as stated above, is set forth in its *Mount*

[1] *WLVA, Incorporated*, 72R–144, released May 26, 1972, —— FCC 2d ——.

[2] New Section 15.68 of the Commission's Rules provides that tuning for UHF channels shall be made comparable to the tuning for VHF channels on new model sets first manufactured after January 1, 1972. A sliding scale of compliance dates requires comparability on 40 percent of all TV models manufactured after July 1, 1972. Some manufacturers have already received an extension of time in which to comply with these new requirements.

Vernon opinions, *supra*, pertinent excerpts of which are set forth below, as follows:

(a) The Commission's policy of fostering the development of UHF was originally generally blocked out in the case of ***Triangle Publications, Inc.***, 29 FCC 315, 17 RR 624 (1960), affirmed *sub nom. Triangle Publications, Inc.* v. *FCC*, 110 U.S. App. D.C. 214, 219 F. 2d 324, 21 RR 2039 (1961), and has been consistently applied. . . . This general policy is still in force and underlies the decision in this case. The particular circumstances here involved directed that we make the assignment under that policy.

(b) The assignment of channel 13 to Mount Vernon provides service to a *significant white area*. This is one of the *strongest priorities* to be met in making a television assignment.

(c) . . . it is sufficient to note that the Commission considered the overlap question . . . and found that the *first service* to Mount Vernon outweighs the minimal effect on existing or potential UHF stations.

(d) . . . we note . . . the position of three of the [UHF] stations . . . as well-established, network-affiliated reasonably profitable operations. . . . Located in cities substantially larger than Mount Vernon, with high UHF circulation and *established audiences*, it is not likely that they will be unduly affected. We agree with the parties . . . that impact is not confined to the demise of the station affected, but can be manifested in other ways such as restrictions on its facilities or program service. (Emphasis supplied.)

4. Unlike the facts in *Mount Vernon*, *supra*, the instant Florence VHF proposal will not provide a first local transmission facility; nor will it provide any white area service. Accordingly, it does not meet the exceptional circumstances and *strong allocation objectives* prescribed by the facts and principles of *Mount Vernon*, *supra*. Moreover, it is to be noted that although one of the reasons advanced by Florence VHF for the expansion of its service area is its desire to increase its amount of unduplicated CBS service, the record is wholly lacking in any evidence in support of this contention. See para. 8 of Florence VHF's Brief in support of exceptions. An examination of the exhibits Florence VHF relies upon reveals that the area upon which it grounds this contention is to an appreciable extent designated as the "Green Swamp" area, and there are no area or population estimates with respect to this essentially swamp area.

5. Further, it is to be noted that, unlike the situation in *Mount Vernon*, *supra*, the Durham UHF station is not well-established; it is a fledgling station, having commenced its operation only 20 months prior to the hearing in this proceeding. It has incurred staggering losses; it has only a nominal network $100 rate, as compared with rates more than ten times greater, in excess of $1,000 each, of the two VHF stations in the Durham-Raleigh market. It's revenues have been 99% local. Under no circumstances, can it be deemed a well-established network affiliated station, nor can its operation be predicted in the future as a reasonably profitable operation. Compare the excerpt of the Commission's opinion in *Mount Vernon*, *supra*, set forth in para. 3(d) above.

6. With these marked differences in mind concerning the facts of this case, how does the majority opinion reach and justify its result? First, it has eliminated from its consideration important facts which establish that Fayetteville and Cumberland County are important population centers within the service areas of the three Durham-Raleigh stations, and within the Durham-Raleigh market, as defined

by ARB. Indeed, it is noteworthy that VHF station WTVD, Durham provides a predicted city grade signal to Fayetteville and a Grade A signal to most of Cumberland County, whereas Raleigh VHF station WRAL and Durham UHF provide Grade B signals to Fayetteville and to large parts, if not, all of Cumberland County. Both the city of Fayetteville (pop. approximately 50,000) and Cumberland County (pop. approximately 200,000)[3] have substantial populations. Fayetteville is the principal community and seat of Cumberland County, and the eighth largest city in North Carolina, according to the 1960 U.S. Census. Moreover, this is the fastest growing area in the State of North Carolina, and it contains the largest population of any city within the enormous gain areas proposed by Florence VHF wherein it intends to compete for audience and for national, regional and local advertising, despite the fact that cable TV facilities are located there. Hence, irrespective of the fact that VHF station WECT, Wilmington, also provides off-the-air service to this area, and cable facilities are located there, Florence VHF, nevertheless, considers Fayetteville and Cumberland County as a ready and significant population center in which to compete for audience and national, regional and local advertising.

7. Why then is not this a significant population center for the potential growth and development of UHF? Surely, if it is such a ready and significant population center for Florence VHF, it must, likewise, be for Durham UHF. In order to avoid coping with the foregoing question, the majority perform major surgery on the Commission's UHF protective policy by severing Fayetteville and Cumberland County from Durham UHF's service area insofar as its UHF protection is concerned. They do so with this simple statement: Durham UHF "must acquire a significant viewing audience in its principal communities of Raleigh and Durham in order to achieve financial security." In short, the majority, in effect, conclude that this important population center of Fayetteville and Cumberland County within Durham UHF's service area and within the Durham-Raleigh market is unrelated to a grant or denial of Florence VHF's application. For, in their words, "WRDU's prospects for survival and economic viability rest within its ability to compete with WRAL and WTVD in its principal communities." See, para. 20 of the majority opinion.

8. Realizing, however, that the UHF impact issue here is directed to Fayetteville and Cumberland County, the majority opinion again simply concludes that "there is no real potential for WRDU to develop a significant audience in Fayetteville or Cumberland County," without regard to the fact that Florence VHF considers this a ready and significant portion of the Raleigh-Durham market in which to compete for audience and national, regional and local advertising. This majority conclusion is bottomed primarily on the cable TV facilities in this predominantly VHF market, and it emphasizes only the failure of Durham UHF to build any off-the-air circulation in Fayetteville and Cumberland County. At most, passing reference is made to the fact that all circulation data in this record results from surveys taken

[3] These approximate population figures are based upon preliminary 1970 census data.

shortly after this UHF station commenced operation. The majority also understate (a) the plight of Durham UHF as a fledgling station; and (b) the constant disadvantages of a UHF station in a VHF market poignantly described by the testimony of Durham UHF's principals. Indeed, not even passing mention is made of NBC's statement that:

> UHF stations in intermixed markets have a competitive disadvantage because the circulation they deliver is typically significantly smaller than the VHF stations with which they compete in the same market. As more UHF-equipped receivers come into use, this competitive disadvantage has lessened and will continue to lessen. However, for some time to come many VHF stations will have a higher effective circulation than the competing UHF station in the same market. It is this *economic fact of life* . . . that places the UHF station at a relative disadvantage in comparison with the VHF stations in the same market. (Emphasis supplied.)

9. In attempting to justify its result, the majority opinion (a) refers to the review of the Commission's UHF policy as set forth in *WLVA*, *supra*, and (b) repeats a conclusion as stated in *Cosmos Broadcasting Corp.*, 21 FCC 2d 729, 733: "where there is a showing of minimal impact only, the Commission's UHF policy does not require a denial of the expanding VHF proposal where there are substantial service benefits to be achieved." However, no where does the majority point out that in *Cosmos*, *supra*, a grant of the VHF application resulted in the elimination of white and gray areas containing a substantial population of 12,000 persons. Hence, the facts in *Cosmos*, *supra*, comport with the *strong allocation objectives* prescribed by the Commission in *Mount Vernon*, *supra*. See, para. 3(b) above. And these *strong allocation objectives*, likewise, comport with the Commission's statement in *Triangle*, *supra*, as reaffirmed in *Mount Vernon*, *supra*, that:

> . . . it is essential to foster optimum conditions for the growth of UHF and to take no steps, unless required by other *exceptional public interest considerations*, which would reduce the demand for UHF service. (Emphasis supplied.)

10. Similarly, in attempting to justify its conclusion, the majority opinion relies on general language—without regard to the facts—in *Atlantic Telecasting Corp.*, 3 FCC 2d 442 (1966); it ignores completely the Commission's Order [4] denying Florence VHF's petition for reconsideration of the designation order which differentiated the facts under consideration here from those in *Atlantic*, *supra*, and limited, in effect, that general language to the facts under consideration in that case.

11. Finally, an additional observation is pertinent with respect to the Commission's decision in *Selma Televison, Inc.*, 29 FCC 2d 522 (1971), and the recent opinion of the Court [5] affirming the Commission's views. There, as in *Mount Vernon*, *supra*, the VHF station would

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[4] There, the Commission stated: "WBTW again relies upon *Atlantic Telecasting*, *supra*, as it did in its opposition to WRDU's informal objection prior to the designation order. This proceeding contains many significant differences from the situation in *Atlantic Telecasting*, however. Here, there is an opposition from an operating UHF station . . . and a grant of WBTW's request would permit the station to place a predicted signal into Fayetteville for the first time." *Daily Telegraph*, 21 FCC 2d 562 (1970).

[5] *WCOV, Inc.* v. *FCC*, decided June 22, 1972. —— U.S. App. D.C. ——, —— F. 2d ——, Case No. 71-1472, D.C. Cir. (Slip Opinion pp. 6).

provide a first local television station to its principal community. In affirming the Commission, the Court stated:

> It is hardly arbitrary or irrational to hold, as the Commission did here, that any adverse UHF impact is easily outweighed by the need to provide the Selma market with television service—a goal which the Commission has been pursuing since 1954. Even with the tenfold increase in its effective radiated power, [VHF station] WSLA will still be one of the weakest stations in the country—weaker by far, incidentally than [UHF station] WCOV. The Commission reasonably found that it was simply not possible to get [VHF station] WSLA back on the air without this modest increase, and that the increase would inevitably cause some further overlap with WCOV's market. We cannot say that the Commission exceeded its mandate by subordinating UHF impact to the need to provide city-grade service to Selma.[6]

12. Hence, just as *Mount Vernon, supra*, met the exceptional public interest considerations prescribed by *Triangle, supra*, *WCOV, Inc.* meets the strong allocation objectives prescribed by *Mount Vernon, supra*. In short, the metes and bounds of the "strong allocation objectives" required for subordination of the Commission's UHF protective policy have been met in all of these cases. However, it cannot be said that the enormous increase in Florence VHF service area proposed in the instant case comports with any strong allocation objectives.

13. Admittedly, the UHF impact policy "has lost some measure of its urgency and is not to be looked upon as an inflexible across-the-board barrier to VHF assignment." [7] However, the surgery performed by the majority opinion here goes way beyond the metes and bounds of *Mount Vernon, supra*, and constitutes the demise of the UHF policy except with respect to the U's principal city. As indicated at para. 2 of this dissenting statement, my views are not directed to the desirability of such a reversal or change of policy. I hold only that the majority opinion extends beyond this Board's jurisdiction, has broad nationwide implications, and is squarely at odds with the Commission's existing UHF protectve policy based upon all of its prior decisions. Surely, extrapolated words, phrases, or even sentences—without regard to the facts of those cases—cannot be deemed to constitute a fair evaluation of the Commission's UHF policy as defined by those cases. Nor can this highly limited UHF principal city protection be deemed to comport

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[6] Compare the Court's recent decisions in *WLVA v. FCC*, ——, U.S. App. D.C. ——, —— F. 2d ——, 23 RR 2d 2081 (1972), and in *West Michigan Telecasters, Inc.*, —— U.S. App. D.C. ——, —— F. 2d ——, 23 RR 2d 2123 (1972). In *West Michigan*, the principal contention of the VHF station centered around an assertion that its future viability may be endangered. There, the Court stated:

> If West Michigan is seriously threatened or in fact adversely affected by either of these occurrences, it may then seek to present sufficient evidence of such detrimental impact to warrant Commission, and possible judicial, review and relief, if such is found to be required. In light of West Michigan's record of viable and high quality operation, however, the record here does not call now for such review. While West Michigan's application . . . no doubt reflects its desire to partake of the more lucrative Grand Rapids-Kalamazoo market, as the Commission noted in *Triangle Publications, Inc.*, (WHNC–TV), "we are not generally concerned with the competitive status of licensees and are not insurers of lucrative operations. We are, however, concerned with the public interest and do become concerned with a licensee's competitive situation when a threatened injury to such licensee would result in a detriment to the public interest. . . ." In the instant case, however, there are no such indications of injury to WZZM–TV's record of profitable operations demonstrated.

In this connection, it is to be noted that Florence VHF now has a profitable operation, but attributes the Charleston VHF tall tower proposed expansion as its primary reason for the expansion which it seeks here. However, Florence VHF filed no *Carroll* type economic injury protest against the Charleston applications, and has not participated in that proceeding.

[7] *Plains Television Corporation, supra.*

with the Commission's policy of encouraging UHF stations to expand their service areas and to operate with maximum facilities in order to compete more effectively for network affiliations, for more than nominal network rates, for non-network syndicated programs, and for national and regional advertising. See, (a) the Commission's First Report and Order *In the Matter of Amendment of Section 73.658 of the Commission's Rules to Limit Television Station's Access to The Programs of More Than One National Network*, FCC 71–322, 28 FCC 2d 169 (1971), 21 RR 2d 1638; and (b) the Commission's Memorandum Opinion and Order, denying petitions for reconsideration of its First Report, 31 FCC 2d 87 (1971). For on the basis of the nationwide track record of UHF stations, it is clear that they cannot do so without a protective UHF policy in all significant population centers of their respective service areas.

F.C.C. 70D–52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DAILY TELEGRAPH PRINTING CO. [WBTW (TV)] FLORENCE, S.C. For Construction Permit To Change Facilities	Docket No. 18650 File No. BPCT–4162

APPEARANCES

Alan C. Campbell, Thomas H. Wall (Dow, Lohnes & Albertson) on behalf of Daily Telegraph Printing Company; *Charles O. Verrill, Jr., George Blow* and *Robinson O. Everett* on behalf of Triangle Telecasters, Inc.; *Robert A. Marmet* and *Gordon R. Malick* on behalf of Cumberland Broadcasting Corporation; and *Jay L. Witkin* and *P. W. Valicenti* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER
CHESTER F. NAUMOWICZ, JR.

(Issued December 3, 1970; Released December 7, 1970)

PRELIMINARY STATEMENT

1. By order released September 2, 1969, the Commission designated the above-captioned application for hearing on the following issues:

1. To determine whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether a grant of the application would serve the public interest, convenience and necessity.

By order of the Review Board released December 30, 1969, the burden of proceeding with the introduction of evidence on Issue No. 1 was placed on the respondent, Triangle Telecasters, Inc.

2. The applicant published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Prehearing conferences and hearings were held on various dates between October 10, 1969 and September 9, 1970. The record was closed by the Examiner's order released October 8, 1970. The filing of proposed and reply findings of fact was concluded on November 17, 1970.

FINDINGS OF FACT

Present Conditions and Proposed Change

3. Telegraph now operates Station WBTW–TV on Channel 13 at Florence, South Carolina. The transmitter is located some 5.5 miles north-northeast of Florence with an ERP of 316 kw, at an HUAT of 790 feet. The instant proposal would move the transmitter approximately 24 miles to a point 28 miles northeast of Florence where it would operate with an ERP of 291 kw in the horizontal plane and 316 kw 0.5 degrees below the horizontal at an HUAT of 1960 feet.

4. The proposed modification would increase coverage as follows:

Contour	Population	Area (sq. mi.)
	Present	
Grade A	379,497	5,395
Grade B	739,261	10,620
	Proposed	
Grade A	781,320	11,012
Grade B	1,206,363	18,353
	Proposed gain	
Grade A	412,345	5,836
Grade B	472,769	7,820
	Proposed loss	
Grade A	10,522	219
Grade B	5,667	87
	Proposed net gain	
Grade A	401,823	5,617
Grade B	467,102	7,733

The principal gain areas are to the north, northeast and east, with a substantial majority of the gained areas and populations lying in North Carolina. The loss areas are in a generally westerly direction.

5. Telegraph's proposal would provide a first Grade A service to 121,126 persons residing in 2,014 sq.mi., a second such service to 132,167 persons in 2,048 sq.mi., and a third Grade A service to 68,886 persons in 1,397 sq. mi. A third Grade B service would be brought to 76,895 persons in 2,050 sq.mi. From one to three Grade A services would continue to be available in the Grade A loss area, and there would remain at least 3 Grade B signals available throughout the Grade B loss area.

UHF Impact

6. The following television allocations are pertinent to the designated issues:[1]

[1] Issue No. 1 speaks in terms of UHF stations "in the area" but does not define that term. These findings include such information as is in the record with respect to allocations within Telegraph's existing or proposed service contours or in cities sufficiently nearby that the contours of UHF stations serving them might be anticipated to overlap materially the contours of WBTW.

Florence, South Carolina
VHF
Channel 13, operating
UHF
Channel 15, unoccupied
Channel 21, unoccupied
Fayetteville, North Carolina
UHF
Channel 40, C.P. outstanding since February, 1967
Channel 62, unoccupied
Wilmington, North Carolina
VHF
Channel 3, operating
Channel 6, operating
UHF
Channel 29, unoccupied
Raleigh, North Carolina
VHF
Channel 5, operating
UHF
Channel 22, unoccupied
Channel 34, unoccupied
Durham, North Carolina
VHF
Channel 11, operating
UHF
Channel 28, operating

The record contains no evidence of any likelihood of UHF activity other than that of the existing station on Channel 28, Durham, and the permittee on Channel 40, Fayetteville. Indeed, what little evidence there is with respect to the other allocations is negative. A construction permit for Channel 15 in Florence was cancelled in 1969 for failure to construct, and the permittee of Channel 22 in Raleigh has offered its permit for cancellation. On the other hand, both the licensee of Channel 28 in Durham and the permittee of Channel 40 in Fayetteville participated in this hearing.

7. Station WCCT holds a construction permit on Channel 40 in Fayetteville. Its proposed service contours embrace the following:

Contour	Population [2]	Area (square miles)
Grade A	148,930	663
Grade B	203,761	1,801

[2] Following the usual Commission practice only the official census figures (1960) have been used for population findings. Since it may be assumed that the 1970 census figures will become available before the Commission ultimately disposes of this application, the parties may wish to prepare a statistical exhibit updating population figures for submission to whatever authority within the Commission shall have jurisdiction over the matter at the appropriate time.

The WBTW and proposed WCCT contours would overlap as follows:

Contour	Population	Percent	Area (sq. mi.)	Percent
	Present			
Grade A	0		0	
Grade B	30,359	(15)	372	(20.66)
	Proposed			
Grade A	119,749	(80.41)	554	(83.56)
Grade B	203,761	(100)	1,801	(100)

At present some 15% of WCCT's proposed Grade A contour does not receive any Grade A service, and the balance receives one or two such signals. Proposed WBTW would provide a Grade A signal over all of the present Grade A white area, and more than half of the remaining area within the WCCT proposed Grade A contour. WCCT's proposed Grade B contour presently receives between 1 and 5 Grade B signals (the Grade B gray area consists of some 2 sq.mi. at the outer limit of WCCT's contour to the southwest). Proposed WBTW would bring an additional Grade B service throughout this area. However, no construction has been undertaken at WCCT nor is it likely that any will be undertaken for the purpose of operating the facility as an independent station. The principal of the permittee does not believe that the station would be economically viable, and the only prospect that it will actually be built is as a satellite of WRDU as discussed at paragraphs 17–19, *infra*.

8. Station WRDU operates on Channel 28 in Durham. Its service contours include the following:

Contour	Population	Area (square miles)
Grade A	870,962	6,116
Grade B	1,527,002	11,197

The WBTW and WRDU contours overlap as follows:

Contour	Population	Percent	Area (sq. mi.)	Percent
	Present			
Grade A	0		0	
Grade B	15,997	(1.05)	245	(2.19)
	Proposed			
Grade A	3,974	(0.48)	98	(1.60)
Grade B	259,770	(17.01)	2,368	(21.18)

Approximately one quarter of the Grade A overlap area now receives only one such service, while the balance of the area now receives 2 or 3 Grade A services. A minimum of three other Grade B services are presently available within the Grade B overlap area, and the overwhelming bulk of the area receives four or more such services.

9. However, the evidence as to potential impact on the UHF stations is not limited merely to the intrusion of another competing VHF signal. To understand the concern of these stations it is necessary to give some attention to the pattern of their development.

10. Triangle began operating Station WRDU in November, 1968 as the third station in the Raleigh-Durham market. The station has not been able to obtain a full network affiliation. For many years Station WTVD, Durham, has had a primary affiliation with CBS and a secondary affiliation with NBC. Triangle has established relations with the two networks whereby it has available the programming which WTVD does not present. However, Triangle cannot be certain far in advance just what network programming will be available, and it is hampered in its efforts to plan and promote. To date it has not built up a sufficiently large net weekly circulation to obtain reimbursement for the NBC programming it carries, and only nominal sums have been received from CBS.

11. In fact, the station has failed to attract revenues from any source sufficient to offset expenses, and the losses have been consistent and substantial. In 1969, the station's only full year of operation, expenses totaled $542,351, while net broadcast revenues were only $77,027. As of December 31, 1969, Triangle's accumulated deficit reached $507,000, and approximately another $103,000 was lost in the first four months of 1970.

12. With the passage of time the station has found growing local acceptance. Its ARB market share has shown a slight increase (Feb./Mar., 1969, 1.8%; Nov., 1969, 1.7%; Feb./Mar., 1970, 2.1%; May, 1970, 3.2%), and revenues through the first four months of 1970 increased over the corresponding 1969 months. However, as heretofore noted, the losses remain substantial, and there is no evidence that the operation is likely to show a profit in the foreseeable future in the present competitive context.

13. Triangle's prospects of changing that situation center in its hope of obtaining a full affiliation with one of the networks. If it can do so, and if it is the sole affiliate of that network throughout most of its service area, it believes that the high viewer appeal of the network programming will enhance its share of the market which will, in turn, attract the advertising revenues needed for profitable operation. However, in order to obtain a full affiliation, Triangle must persuade one of the networks to modify its present arrangements.

14. As of this time, the three networks place primary dependence on the two VHF stations in the Raleigh-Durham market. Station WRAZ, operating on Channel 5 in Raleigh, is an ABC affiliate. Station WTVD, Channel 11, is a primary CBS affiliate with a secondary NBC affiliation. While Triangle can obtain most of the CBS and NBC programming WTVD rejects, that arrangement is unsatisfactory as noted at paragraph 10, *supra*. Hence, it hopes that WTVD will select one of

the networks, thereby rendering the full service of the other available for WRDU.[3]

15. Triangle is pursuing two main efforts to secure a full network service: it is seeking rule making at the Commission which would force WTVD to choose between CBS and NBC; and it is attempting to acquire another UHF facility to operate as a satellite thereby making itself more attractive to the networks.

16. In the fall of 1969 Triangle filed a petition with the Commission to amend Rule 73.658 to forbid stations in markets having three or more stations to affiliate with more than one network.[4] NBC's response to that petition illustrates the problem Triangle faces in securing a full network affiliation. The network noted that according to the most recent ARB survey the average quarter hour viewers for the VHF stations in the Raleigh-Durham market were in the 70–80,000 range whereas WRDU averages less than 3,000 such viewers. In view of this wide discrepancy, the network preferred to have its programs broadcast over the VHF station even on a delayed basis, because it could anticipate a much larger audience.

Thus, NBC found secondary affiliation with WTVD more attractive than full time affiliation with WRDU. The decision is based on purely economic grounds, and the record furnishes no basis for belief that it may be changed willingly in the foreseeable future.

17. As an alternative, or supplement, to rule making Triangle has plans to acquire UHF facilities in Fayetteville to operate as a satellite of WRDU. Fayetteville is some 64 miles south of Durham and approximately 77 miles northeast of Florence. It has a population of around 50,000. Although two UHF channels have been allocated to Fayetteville, no television station operates there. A construction permit has been issued on Channel 40 to Station WCCT, but no actual construction has commenced. In fact, Jackson F. Lee, the principal of WCCT, is of the opinion that it would not be economically feasible to operate an independent station on the channel. Accordingly, in the Spring of 1969 Lee approached Triangle to ascertain whether some sort of Joint action might be mutually advantageous. The result was an agreement reached on July 19, 1969, whereby the major stockholders of Triangle would acquire 75% of the stock of Cumberland Broadcasting Corp., the permittee of WCCT, with Mr. Lee retaining a 25% interest. The station would then be built on Channel 40 in Fayetteville and operated as a satellite of WRDU. This agreement is not only conditioned upon obtaining the consent of the Commission, but upon obtaining the consent of the networks for the rebroadcast of their programs. CBS has given verbal consent to the proposal while NBC has rejected it.

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[3] In the Spring of 1969 WRDU broadcast 78 hours weekly of the NBC programming (21 hours prime time) and 16 hours of CBS programming (12 hours prime time). During the week of November 8–14, 1969, the station carried approximately 40 hours per week of NBC programming (11½ hours prime time), and 17 hours of CBS programs (9 hours prime). The schedule for July, 1970 included approximately 46 hours of NBC programs weekly (12 hours prime), and 9½ hours of CBS programming (6 hours prime). Effective September 13, 1970 WRDU contemplated some 44 hours of NBC programs (10½ hours prime) and 7½ hours from CBS (6½ hours prime).

[4] A copy of the petition was rejected as an exhibit in the hearing, and the Examiner declined to take official notice of the file. The finding of fact is based upon official notice only that a petition to the described end was filed, and not upon the contents, arguments or allegations of that petition.

18. In any event, it is difficult to predict the magnitude of any augmentation of WRDU's audience if it should be able to activate a satellite in Fayetteville. The community is now serviced by a CATV system which had connections to 10,746 homes as of May 1, 1970.[5] The CATV system lies within the Grade A contours of Stations WTVD, Durham (CBS and NBC); WECT, Wilmington, North Carolina (NBC); and the Grade B contour of WRDU, and all three stations are carried on the system. Thus, the signals of stations carrying network programs are now available off-the-air as well as on CATV, and a local satellite station is not likely to find a substantial untapped audience unless it is entitled to exclusivity on the CATV system.

19. It is far from clear that the Commission's Rules would entitle WRDU's proposed satellite to program exclusively on the Fayetteville CATV system. The question would turn on whether the Fayetteville operation was regarded as a "satellite" or as a "translator". Both words are used in the Commission's CATV rules, but only "translator" is defined therein.[6] The CATV rules do not define "satellite", nor, so far as is known by the Examiner, do any other rules. However, the Commission has defined the term *In the Matter of Amendment of the Commission's Rules Relating to Multiple Ownership*, 3 RR 2d 1554, 1562, as a station "operating on a channel specified in the television Table of Assignments and meeting all of the technical requirements of our rules, but one which usually originates no local programming and which may, and often does, involve overlap with a commonly owned 'parent' station to a degree which would not be consistent with the duopoly rules; it rebroadcasts the programming of the parent station, usually a station under the same ownership in the region. Such stations have been authorized, since 1954, on the basis of relaxation of our policies concerning local program origination and, if necessary, waiver of Sec. 73.636 as to overlap." Thus it would appear that the operation proposed by Triangle in Fayetteville would fit either definition. If it is deemed a "translator" it would be entitled on its own to only the fourth degree of priority pursuant to Rule 74.1103(a)(4). (Indeed, the CATV system would not be required to carry the translator at all if it continued to carry the signal of WRDU pursuant to Rule 74.1103(b)(3)(i).) However, if the Fayetteville operation were regarded as a "satellite" its degree of priority would be determined by its signal strength in Fayetteville pursuant to Rule 74.1103(b)(4). Since the "satellite" would be one "within whose principal community contours the system or the community of the system is located in whole or in part" pursuant to Rule 74.1103(a)(1), it would be entitled to the first degree of protection and could claim exclusivity over any other sta-

[5] While the record does not disclose the total number of households in Fayetteville, it is apparent that 10,746 homes represent very substantial penetration in the city of approximately 50,000 population. That is to say, a large majority of the residents of Fayetteville are *not* dependent of the quality of off-the-air signals at their homes.

[6] Rule 74.1101(b) states "the term 'television translator station' means a television broadcast translator station as defined in Sec. 74.701 of this chapter". Rule 74.701(a) states that a television broadcast translator station is "a station in the broadcasting service operated for the purpose of retransmitting the signals of a television broadcast station . . . by means of direct frequency conversion and amplification of the incoming signal without significantly altering any characteristic of the incoming signal other than its frequency and amplitude, for the purpose of providing television reception to the general public."

tion presenting the same network programming. In view of this complexity in the rules, it cannot be predicted, absent Commission clarification, just what exclusivity a Fayetteville UHF operation rebroadcasting the WRDU schedule would enjoy on the Fayetteville CATV system.

20. Significantly, it is in the area of Fayetteville, that Triangle feels itself most likely to be damaged by Telegraph's proposed move. Toward the end of 1968 Triangle was advised by CBS that its affiliation was being cancelled. While this action was subsequently reversed, conversations with a CBS official indicated that the network's affiliation decisions were based upon a station's ability to serve areas not served by other CBS affiliates. Triangle fears that if Telegraph is permitted to make its proposed move it will bring its CBS programs into areas around Fayetteville which now receive such programs only from Triangle, thereby leading to a cancellation of Triangle's CBS affiliation, or, at the least, to additional barriers to Triangle's obtaining full affiliation and securing viewers' and advertisers' support in the area.

21. Triangle's concern is centered in the increased Grade B overlap with respect to its own operation, and in both Grade A and B overlap with respect to the proposed satellite operation of Fayetteville Station WCCT. As indicated at paragraph 7 and 8, *supra*, the areas of overlap are substantial relative to the total areas served by WRDU and WCCT. However, although the record indicates that a number of other services are now available throughout most of the overlap areas, it does not indicate clearly just what, if any, network white areas are now served by WRDU or would be served by WCCT.

22. Even if it were possible to make a finding that Telegraph's proposed move would add a competing CBS signal to specific areas where such a signal is now available only from WRDU or proposed WCCT, it would not be possible to assess with confidence the probable significance of that development. Possibly CBS has considered what it would do in the event and made a decision; possibly it has a policy covering the situation or precedents of action taken in comparable circumstances. On all these matters the record is silent for no official of CBS was presented as a witness.[7] Thus, the consequences discussed at paragraph 20, *supra*, represent only the fears of Triangle based upon remarks made by a CBS official some two years ago, not reasonable conclusions based upon either the representations or past actions of the network. This is not to say that Triangle's fears are unjustified, only that the justification is not established on this record.

Reasons for Proposed Move of WBTW

23. Telegraph acquired WBTW in early 1968 by purchase. At that time the station was in a position of declining profits,[8] and the seller

[7] The last hearing session in this proceeding was conducted on September 9, 1970. At that time the record was held open in order that a CBS official might be presented as a witness by Telegraph. On September 30, 1970, Telegraph wrote the Examiner stating it did not intend to present the witness. On October 8, 1970, Triangle filed a "Position" relative to the matter but did not offer to produce a CBS witness itself.

[8] The record indicates that newly constructed stations in the area sharply increased the competition to WBTW in the years prior to the sale. However, it does not contain sufficient information to permit a finding as to what extent this contributed to the declining profit picture.

advised Telegraph that it would be desirable to improve the station's facilities to remedy the situation.[9] Moreover, there is pending before the Commission a proposal by the four television stations in Charleston, South Carolina to move toward Florence on a joint candelabra antenna. If this is granted Telegraph fears not only the increased competition from the stronger signals, but that CBS might consider disaffiliating with WBTW and relying on its Charleston affiliate to cover the area.[10] Hence, Telegraph promptly undertook to seek modification of the facilities of its newly acquired station.

24. Since the station was already operating at maximum allowed power, increased coverage could be obtained at the present site only by increasing tower height. However, air hazard considerations precluded that course. Channel separation requirements prevent any move to the west. The management of the station does not wish to move south into increased competition with the Charleston stations. A move to the east would be toward the Atlantic ocean. Thus, the sole direction in which the station believed it could prudently move was to the northeast thereby increasing coverage in the directions of Fayetteville and Wilmington, North Carolina.

25. Telegraph has not prepared written cost or revenue projections on the basis of its proposed move. However, it hopes for a revenue increase of 10–15% in the first year, and more after that.

At the time this hope was articulated the Telegraph management had already succeeded in improving the station's financial performace. From April 1, 1968 through the end of the year the station had revenues of $1,138,211 and expenses of $1,046,711 for a before tax profit of $91,500. The 1969 revenues were $1,621,216 and expenses were $906,857 for a pre-tax profit of $653,359. During the period the station has sold more advertising, held its rates steady, and has enjoyed an increase in circulation.

CONCLUSIONS

26. The UHF impact issue designated herein is applicable to all UHF activity in the impact area; existing, authorized and prospective. However, the evidence has been limited to the potential effect upon WRDU and proposed WCCT. UHF construction permits in Florence and Raleigh have been abandoned without construction, and there is no showing of any further interest, or of any apparent opportunity, in the area. Consequently, it is concluded that on this record there is no showing that Telegraph's proposed move would have an adverse effect upon UHF development except insofar as it may affect WRDU and/or WCCT.

27. WCCT cannot be considered separately from WRDU. No construction has been undertaken at the station nor is any contemplated unless the arrangements to operate it as a satellite of WRDU can be consummated. The coincidence of population concentration and television allocation in the area is not such as to render probable the exist-

[9] The previous owner was hampered in any attempt to modify the station's facilities by overlap problems with a commonly owned station in North Carolina.

[10] No representative of CBS was called to testify as to the network's views on the matter. However, Telegraph's fear strongly implies that it shares Triangle's understanding of network affiliation practices discussed at paragraph 20, *supra*.

ence of a viable independent UHF station in Fayetteville. If the outstanding permit on Channel 40 in Fayetteville were the sole UHF activity in the area, it would not be concluded that the likelihood it would ever be built was sufficiently great to warrant restraining VHF expansion.

28. However, WCCT's prospects are not limited to its potential as an independent station. There is a proposal to build and operate it as a satellite of existing WRDU, and this proposal is worthy of serious examination.

29. Station WRDU is the only functioning UHF station in the area. Although not the subject of evidence on the record, the reason it was built is apparent. As the third station in the populous Raleigh-Durham market the licensee must have hoped—perhaps assumed—that the station would quickly gain affiliation with one of the national networks. While such affiliation might not have guaranteed profitability, it would have provided a base of popular programming and network income upon which a vigorous management might reasonably have expected to erect a prosperous operation.

30. However, full affiliation has not come. The available networks, NBC and CBS have preferred to permit one of the local VHF stations to pick and choose among their programs with the unselected material being made available to WRDU. Under these circumstances the station has been unable to build up a dependable audience of sufficient size either to earn more than token network revenues or to attract substantial support from local advertisers. As a consequence, its financial history has been one of continuing large losses.

31. Although the passage of time has seen a relatively large—but absolutely slight—growth in audiences, and a reduction in monthly losses, it cannot reasonably be said that the break-even point is in sight. Triangle offered no projection, nor does one suggest itself, whereby a date can be set when income is likely to equal outgo. Thus, if things continue as they are there must come a time, and reasonably soon, when the WRDU management will regard continued operation of the station as economic folly. That is to say, the station would be taken off the air with no reasonable prospect of its revival.[11]

32. However, Triangle is pursuing efforts to see that things do not stay as they are. It is seeking rule making from the Commission which would, in effect, preclude the two VHF stations in the Raleigh-Durham market from maintaining affiliation with more than one network. This, if adopted, would have the probable result of compelling the network unselected by the VHF stations to affiliate with WRDU as the least undesirable option remaining open to it. However, it is plain that this prospect might be dimmed if CBS were to end up as the unselected network by the Raleigh-Durham VHF's, and if CBS programming were also available throughout much of WRDU's service area from CBS affiliate, WBTW.

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[11] This conclusion has seemed to the Examiner so inescapable that he has refrained from making findings as to evidence in the record regarding WBTW's potential effect on WRDU's existing audience. Such studies cannot pretend to precision, and if the station's existing audience cannot support it, estimates as to potential fragmentation of that audience lack materiality.

109-004—72——3

33. WRDU also hopes to increase its audience by augmenting its viewership in the Fayetteville area. This it would do by acquiring the existing permit for Channel 40 in Fayetteville and building the station as a satellite. While this project is dependent upon obtaining the consent of the Commission and of the networks whose programs would be rebroadcast, it holds promise of materially affecting WRDU's fortunes.

34. The Fayetteville area contains a substantial and growing population. Although the population is not sufficiently large in view of the distant signals already available to support an independent station, it does present an opportunity for a new station to attract a significant audience, as witness Telegraph's own efforts to expand its coverage in that direction. If Triangle can build up its actual and potential audience through means of a satellite it will become more attractive to local and regional advertisers and may appear a more desirable vehicle for the presentation of network programs. All of this is, of course, very hazy. First, all of the consents must be obtained. Then, the satellite would be required to compete not only with the other networks available off-the-air, but with its own network programs being broadcast by other stations available in the area. CATV has made extensive penetration in the area, and, as noted at paragraph 19, *supra*, it is unclear just what preference the "satellite" might have for its programs on the system.

35. Thus, it is far from certain that the satellite operation in Fayetteville has a realistic chance of developing WRDU's audience to a point of economic viability. The prospects seem so speculative that, if the situation involved unbuilt stations and unproven investors, the Examiner would not conclude that there was a reasonable likelihood that the venture would even be attempted. However, in this instance the owners of WRDU have demonstrated a willingness to risk very substantial amounts of money in a UHF venture in the area, and their vigorous participation in this hearing demonstrates a continuing interest in the situation. They suggest that they are willing to make the additional investment if the necessary consents are granted, and their performance to date warrants confidence in that representation. Thus, it would be unrealistic and unjust to regard the demise of WRDU as wholly inevitable.

36. However, the proposed modification of the WBTW operation would alter the picture perceptibly. At this time the Fayetteville area is relatively underserved off-the-air, and some opportunity exists for a strong new signal to attract viewers. The addition of a Grade A signal from WBTW could not fail to drain off a portion of this potential market. This should be especially harmful when both stations are presenting the same programs, although the preponderance of NBC programming presented by WRDU should tend to minimize this effect. In addition, WRDU's presentations over the Fayetteville CATV system might be watered down, although no firm conclusion in this area can be reached absent knowledge as to the relative CATV priorities which would obtain.

37. Overall, it is concluded that if WBTW is authorized to make its proposed move, it will impair WRDU's prospects of substantially in-

creasing its audience through a satellite operation in Fayetteville. Such failure will, unless the station is able to secure a full network affiliation unsubject to competition in the Raleigh-Durham market, almost certainly result in the termination of the WRDU operation.

38. This conclusion does not automatically result in the denial of the WBTW application. The Commission's policy of fostering UHF development is balanced against its policy of encouraging VHF stations to operate with maximum facilities, and WBTW's present competitive position is one of the factors to be considered, *Daily Telegraph Printing Co.*, 21 FCC 2d 562. Thus, if WBTW is shown to be in a position where economic factors are likely to create a situation whereby the public will lose all or part of its service, this risk must be weighed against the likelihood and benefit of the survival and expansion of WRDU.

39. However, the need for such balancing is not shown on this record. While competition to WBTW has undoubtedly increased since it was built, Telegraph purchased the operation in 1968 for what must be presumed to have been a fair price, and there is no showing of any material change in the competitive picture since that time. Indeed, circulation has increased, revenues have increased, expenses have decreased, and profits are up substantially. While there is a threat of increased competition from the Charleston stations if they are permitted to effectuate a proposed move, there is no showing as to how much such an event is likely to affect WBTW.[12] In short, it cannot be concluded on this record that competitive or economic pressures actually endanger WBTW or the public it serves if the instant application is denied.

40. In sum, it is concluded that WRDU is an unprofitable and dying UHF operation; that there is some chance of revivification if that station can attract additional audience by expanding its operation in the relatively underserved Fayetteville area; that its prospects of attracting additional viewers would be impaired if WBTW is permitted to increase its signal strength in the area; and that WBTW's present competitive and economic situation is not such as to endanger its existence or service. From this it is concluded that the public interest would be best served if the Daily Telegraph application is denied.

41. In reaching this conclusion the Examiner is aware of the conjectural nature of many of the facts and assumptions upon which he has relied. Will the Commission grant Triangle's proposed rule making, and, if so, will it actually lead to a full network affiliation for WRDU? Will the Commission consent to the acquisition by Triangle of the Fayetteville UHF permit? If so, will the networks consent to the rebroadcast of their programs? If the Fayetteville station is built, to what priority of protection will it be entitled on the Fayetteville CATV system? Will the inauguration of a satellite in Fayetteville attract sufficient additional viewers to WRDU to increase significantly advertiser and network interest? Will the Charleston stations be permitted to move, and, if so, will such move materially

[12] If the move of the Charleston stations and the move of WBTW are actually interdependent, possibly the applications should have been consolidated for hearing. There is no showing on this record that any party sought such consolidation.

affect WBTW? This record does not even suggest the answers to these questions, nor, in the main, could it. Yet, in each instance the Examiner has assumed a result favorable to WRDU. He has done so because he reads the Commission's precedents as going to the very edge of reasonable hope in an attempt to foster UHF growth, *Triangle Publications, Inc.*, 17 RR 624, 624f; *Triangle Publications, Inc.*, 3 RR 2d 37, 52; *WHAS, Inc.*, 8 RR 2d 1214; *WLCY–TV, Inc.*, 15 RR 2d 642. While UHF stations are not blindly protected from VHF competition in the absence of any showing of probable actual harm, *Cosmos B/Casting Corp.*, 18 RR 2d 538, the evidence in this case demonstrates a possibility of specific damage to a specific UHF operation. Although the likelihood that the UHF station will survive, even absent the damage from the WBTW move, is dependent on several uncertainties, a case of reasonably possible adverse impact has been made out.

42. Nevertheless, as events unfold some of the questions posed in the preceding paragraph may be answered in whole or in part. Such answers might go far toward resolving the conjectures upon which this Initial Decision has necessarily been based. Hence, there is a temptation to delay the release of this document to await developments. Yet, such a procedure would itself be unfair, for the parties are entitled to expect resolution of their cases, on the record they have made, at the earliest possible moment.

43. On the other hand, experience suggests that this Initial Decision will not end the matter. It is to be expected that review will be sought by some or all of the parties. In all probability some of the uncertainties will be resolved while the matter is on review. Hopefully, the parties should find it possible to stipulate to certain of this information and submit such stipulations to the body within the agency having jurisdiction over the case at the time.[13] If such a procedure can be followed the final decision can be rooted more firmly in facts as they shall have become rather than as they are now assumed to be.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with Rule 1.276, the subject application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
CHESTER F. NAUMOWICZ, JR., *Hearing Examiner.*

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[13] Both the Review Board in the first instance and ultimately the Commission undertake *de novo* rather than appellate review of Initial Decisions. Hence, there is no practical or legal, as opposed to legalistic, objection to those authorities considering facts which were not before the Examiner, and no reason why the stipulated submission of such facts should entail the delay incident to a remand for further hearing.

F.C.C. 72-648

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re D. J. CABLE CO., INC., NAZARETH BOROUGH, TATAMY BOROUGH, UPPER NAZARETH TOWNSHIP, AND LOWER NAZARETH TOWNSHIP, PA. Petition for Waiver of Sections 76.57, 76.91, and 76.93 of the Commission's Rules	SR-47010 (PA251, PA254, PA-255, PA250)

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 25, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. D. J. Cable Co., Inc. operates cable television systems at Nazareth Borough, Tatamy Borough, Upper Nazareth Township, and Lower Nazareth Township, Pennsylvania, which provide approximately 1,900 subscribers with the signals of the following television broadcast stations: WLVT-TV (Educ.), Allentown, Pennsylvania; WCBS-TV (CBS), WNBC-TV (NBC), WABC-TV (ABC), WOR-TV (Ind.), WNEW-TV (Ind.), and WPIX (Ind.), all New York, New York; KYW-TV (NBC), WCAU-TV (CBS), WPVI-TV (ABC), WKBS-TV (Ind.), WPHL-TV (Ind.), and WTAF-TV (Ind.), all Philadelphia, Pennsylvania; WBRE-TV (NBC), Wilkes-Barre, Pennsylvania; and WNEP-TV (ABC), Scranton, Pennsylvania. The systems are all within the predicted Grade A contour of WBRE-TV and all are located outside of all television markets. WBRE-TV, Inc., licensee of Station WBRE-TV, has requested carriage and program exclusivity against the duplicating Grade B signals of Stations KYW-TV and WNBC-TV.

2. On April 29, 1970, D. J. Cable filed a "Petition for Declaratory Ruling and/or Waiver", seeking waiver of the carriage and program exclusivity provisions of Sections 76.57, 76.91, and 76.93 of the Com-

mission's Rules,[1] with respect to WBRE–TV. WBRE–TV has filed a motion to dismiss the petition.[2]

3. In support of its petition, D. J. Cable asserts: (a) that WBRE–TV does not place an actual Grade A contour over the communities that D. J. Cable serves; (b) that the localities served by D. J. Cable have a greater community of interest with Philadelphia than with Wilkes-Barre; (c) that granting carriage and program exclusivity to WBRE–TV will disrupt viewing habits with no benefit to be derived in return; (d) that the communities served by D. J. Cable are outside the specified zone of WBRE–TV, and, therefore, no adverse effect will result from granting the petition; and (e) that requiring carriage of WBRE–TV would necessitate, due to limited channel capacity, either the "bumping" of a signal long carried or the cutting back of plans for significant local origination, both alternatives being contrary to the public interest.

4. We rule on D. J. Cable's arguments as follows: (a) this argument is not supported by engineering evidence, and therefore does not overcome the presumption of service that arises from a predicted contour. Hence, WBRE–TV is entitled to carriage and program exclusivity vis-a-vis KYW–TV and WNBC–TV which place only Grade B contours over these communities; (b), (d) the *Second Report and Order in Docket 14895 et al.*, 2 FCC 2d 725, and the *Cable Television Report and Order*, FCC 72–108, ——FCC 2d——, explain the Commission's reasons for requiring carriage and program exclusivity when a community lies within the predicted contours of a television broadcast station, and these reasons do not depend on community orientation or ties, or on a special showing of need; (c) when the Commission adopted the *Cable Teleivsion Report and Order, supra*, it reconsidered the question of disruption of viewing habits and concluded that simultaneous program exclusivity struck a reasonable balance between the competing interests; and (e) we note that D. J. Cable currently carries 15 television signals, including WBRE–TV, on its 12-channel systems. Thus the "bumping" argument appears moot. See *Pottsville Trans-Video*, FCC 70–83, 21 FCC 2d 222. Deletion of duplicating programs because of program exclusivity would seem to provide adequate channel time for the three hours per week of program originations envisioned by D. J. Cable.

In view of the foregoing, the Commission finds that a grant of the requested waiver of Sections 76.57, 76.91, and 76.93 of the Commission's Rules would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Declaratory Ruling and/or Waiver" filed by D. J. Cable Co., Inc., IS DENIED.

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[1] D. J. Cable's petition refers to Section 74.1103 of the Rules. In connection with the *Cable Television Report and Order*, FCC 72–108, released February 3, 1972, these provisions were modified slightly and republished as Sections 76.57, 76.91, and 76.93. In addition, the Commission indicated in Paragraph 114 of the *Cable Television Report and Order, supra*, that requests for same-day network program exclusivity would be presumed to have been modified to request only simultaneous exclusivity if cases involving such requests, such as SR–47010, were still pending when the new rules became effective on March 31, 1972.

[2] In light of our disposition of the Petition, there appears to be no reason to act upon WBRE–TV's motion to dismiss.

IT IS FURTHER ORDERED, That D. J. Cable Co., Inc. IS DIRECTED to comply with the requirements of Sections 76.57, 76.91, and 76.93 of the Commission's Rules on its cable television systems at Nazareth Borough, Tatamy Borough, Upper Nazareth Township, and Lower Nazareth Township within thirty (30) days of the release date of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED, That in view of our action herein, D. J. Cable Co., Inc., is not required to obtain a certificate of compliance at this time as a prerequisite to its carriage of WBRE–TV, and Section 76.11 of the Commission's Rules IS hereby WAIVED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-534

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE HANDLING OF PUBLIC ISSUES UNDER THE FAIRNESS DOCTRINE AND THE PUBLIC INTEREST STANDARDS OF THE COMMUNICATIONS ACT	Docket No. 19260

FIRST REPORT—HANDLING OF POLITICAL BROADCAST

(Adopted June 16, 1972; Released June 22, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER WILEY ISSUING A SEPARATE STATEMENT.

I. INTRODUCTION

1. This first report deals with Part V of our Notice—the fairness doctrine as it relates to political broadcasts. We would ordinarily consider this aspect in the context of the revisions made in the general fairness area, including possible public interest decisions as to access. However, we are operating under time constraints here that we must take into account—namely, the appropriateness of disposing of this aspect well before the commencement of the general election period. See *DNC* v. *FCC*, —— U.S. App. D.C. ——, —— FCC 2d ——, Case No. 71-1738 (D.C. Cir. Feb. 22, 1972), (slip op. at 7). We therefore have expedited our consideration of this aspect and, if necessary, will re-examine this report in light of our later decisions in Parts II–IV.

2. While this was the last topic in this inquiry, it is not, of course, the one of least importance. Promotion of robust, wide-open debate in this field vitally serves the public interest.

II. BACKGROUND

3. In applying the fairness doctrine the Commission has traditionally required licensees to afford reasonable opportunity for the presentation of contrasting views following the presentation of one side of a controversial issue of public importance. The licensee has been given wide discretion in selecting the appropriate spokesman, format and time for the presentation of the opposing views on controversial issues, with two significant exceptions. Under § 315 of the Communications Act of 1934, as amended, licensees are required to afford equal time to legally qualified candidates; and under the Commission's political editorializing rules (§ 73.123(c), 73.300(c), 73.598(c), 73.679(c)) the

licensee must afford a reasonable opportunity for a candidate or his spokesman to respond when the licensee has opposed him or supported his opponent in an editorial.

4. Under the ruling in *Letter to Mr. Nicholas Zapple*, 23 F.C.C. 2d 707 (1970) the Commission further limited the licensee's discretion. The Commission held in *Zapple* that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent, then the licensee must afford comparable time to the spokesmen for an opponent.[1] Known as the quasi-equal opportunities or political party corollary to the fairness doctrine, the *Zapple* doctrine is based on the equal opportunity requirement of Section 315 of the Communiciations Act; accordingly, free time need not be afforded to respond to a paid program.

5. Since some controversy has been generated as to the applicability or wisdom of this doctrine, the Commission asked for public comment on the following questions in its Notice of Public Inquiry in Docket No. 19260 (hereinafter, Fairness Inquiry).

"Should the quasi-equal opportunities approach be restricted or expanded and what is the feasibility and effect of any proposed revision on the underlying policies of the statute (see Section 315(a))?

"—Should the Commission adopt a position that *Zapple* applies only to political campaigns and not to other times?

"—Should *Zapple* be disassociated from the fairness doctrine and incorporated into Section 315?

"—Should *Zapple* be limited by applying a 7-day deadline for requesting "quasi-equal opportunities"?

"—Should *Zapple* continue to apply only to major parties (see *Letter to Lawrence M. C. Smith*, 25 R.R. 291 (1963)), or should it be extended to all parties or to some mathematically-defined category of "parties with substantial public support" (e.g., percentage of popular vote)? How should it apply to "new" parties?

"—Should *Zapple* be extended to include spokesmen for ballot issues such as bond issues, amendments of state constitutions, etc.?"

6. One additional suggestion has been that the *Zapple* doctrine should be extended to include broadcast appearances of the President of the United States so that an automatic right to respond in comparable time, format, etc., would accrue to appropriate spokesman following a Presidential appearance. In *Complaint of Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 294–298 (1970), the Commission declined to extend the *Zapple* quasi-equal opportunities concept generally to Presidential appearances, although it said that the fairness doctrine was applicable to Presidential appearances when dealing with controversial issues of public importance. Upon re-examination in *Republican National Committee*, 25 F.C.C. 2d 739, 744 (1970), the Commission again explained that Presidential

[1] In *In Re Complaint of Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970), affirmed on reconsideration sub nom. *Republican National Committee*, 25 F.C.C. 2d 739 (1970), the Commission extended the *Zapple* ruling to a non-campaign period proffer of time to a political party chairman where the licensee did not specify the issue or issues to be discussed. This ruling was reversed in *Columbia Broadcasting Co. v. F.C.C.*, 454 F. 2d 1018, (D.C. Cir. 1971).

broadcasts made in a non-election period do not come within the *Zapple* corollary but are included under the general fairness doctrine to the extent that controversial issues of importance are discussed. The question was raised once again and ruled on by the Commission in *Democratic National Committee*, 31 F.C.C. 2d 708 (1971), aff'd *Democratic National Committee* v. *F.C.C.*, ——— U.S. App. D.C. ———. F. 2d ———, Case No. 71–1738 (D.C. Cir. Feb. 22, 1972). However, we solicited the comments of the public on the questions raised in these cases in this inquiry.

III. SUMMARY OF COMMENTS

7. Extensive comments and reply comments addressing these questions were received in response to the Fairness Inquiry from fourteen parties. In addition, the Commission conducted panel discussions and heard oral argument for a full week in March 1972, during which these issues were exhaustively discussed. (A list of all participants is included in Appendix A). A variety of ideas, proposals, and criticisms were presented, a brief summary of which follows.

8. Storer Broadcasting Company observes that since the fairness doctrine, unlike Section 315, gives no particular person a right to reply to previously broadcast material, the extension of the fairness doctrine to a quasi-equal opportunities doctrine in *Zapple* is a contradiction of the fairness doctrine. As presently constituted, *Zapple* and its progeny provide insufficient direction to licensees as to when comparable responses to non-campaign appearances of public officials are required, as to which party spokesman is entitled to reply when different factions within a party wish to respond, and as to the rights of minority parties to comparable time. Storer recommends, therefore, that *Zapple* should be codified in Commission rules or be incorporated into Section 315 to remove it from the ambit of the fairness doctrine. Storer further suggests that the Commission adopt a political broadcast primer to specify licensee obligations and responsibilities in this area.

9. The National Association of Broadcasters (NAB), General Electric Broadcasting Co., American Broadcasting Co. (ABC), National Broadcasting Co. (NBC), the Evening News Association, Lee Enterprises, Inc., Time Life Broadcasting, Inc. and others support the principles of the *Zapple* doctrine so long as the *Cullman*[2] doctrine continues to be inapplicable, and licensees are not required to subsidize the campaigns of opposing candidates by affording free response time. *Zapple* is seen by those filing joint comments with the Evening News Association as an appropriate means to fulfill the purposes of Section 315, ensuring the equality of treatment of political candidates by broadcast licensees. Consequently, they would impose obligations on licensees only when a campaign is in progress in which the broadcaster has afforded time and relinquished content control to a spokesman for a candidate to support that candidate or to oppose rival candidates.

[2] *Cullman Broadcasting Co. Inc.*, 40 F.C.C. 576, 577 (1963) held that ". . . where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and thus leave the public uninformed—on the ground that he cannot obtain paid sponsorship for that presentation."

10. The NAB, ABC, NBC, and G.E. Broadcasting Co. argue that the *Zapple* doctrine should also apply to "political" broadcasts where a campaign *issue* (bond proposal, constitutional amendment, etc.) that is supported or opposed by a political spokesman has been placed on the ballot. It is argued that this situation is analogous to both Section 315 and *Zapple*, and, as is the case with the political spokesman doctrine, *Cullman* should not apply. NBC emphasizes that the quasi-equal opportunity approach of *Zapple* or its extension to ballot issues should apply only to *paid* presentations in campaign periods, since the equal opportunities approach involving free time inhibits the presentation of political programming and interferes with a licensee's editorial judgment.

11. Two commentators, Democratic National Committee (DNC) and American Civil Liberties Union (ACLU) suggest that the Commission extend the fairness doctrine or adopt a specific rule that would require licensees to broadcast the opposing views of appropriate spokesmen following an appearance of a public official. It is claimed that there is an overriding national concern in informing the public on both sides of issues dealt with by public officials, and accordingly, that licensee discretion in presenting opposing views and selecting appropriate spokesman should be more limited than at present.

12. DNC specifically urges the adoption of a rule that: (1) would establish a presumption that a Presidential broadcast appearance involves a controversial issue of public importance; (2) would require licensees to seek out appropriate spokesmen to present an opposing view and to afford them equal opportunities; and (3) would require licensees or networks to keep publicly available for three years a tape or transcript of every Presidential appearance. DNC asserts that such a rule is necessitated by the public interest standard of the Communications Act and by the First Amendment, in view of the public's need to be fully informed on important public issues discussed by the President. The public is not presently receiving balanced information on such issues, DNC believes, because the President's control of the time, format, and content of his appearances maximizes their impact and effectiveness while, on the other hand, the difficulties encountered by DNC in buying time to discuss public issues or in securing free time to respond to Presidential appearances limits the effectiveness of the presentation of their viewpoint. DNC's views are currently presented, it maintains, through news and panel show presentations in which DNC representatives are merely responding to questions and have no opportunity, comparable to the President's, to develop a reasoned and uninterrupted presentation of the issues. DNC thus argues that the First Amendment goal of promoting robust, wide-open debate is being thwarted by its rejection as an entity responsible for defining options for the American people on major public issues and by denying it access, comparable to the President's, to respond to his appearances.

13. ACLU maintains that the responsibility of the licensee under the fairness doctrine should extend to making available comparable opportunities for opposing spokesmen to comment on the issues raised in the broadcast appearance of any public official, including the President. Because of the President's unquestioned power to command

broadcasting time and to attract an audience, ACLU feels that comparable time can be afforded only if the contrasting viewpoint is presented immediately after each Presidential appearance. The President and other public officials should furnish copies of their statements sufficiently in advance of their broadcast to permit station licensees to fulfill these fairness obligations.

14. The proposals of DNC and ACLU were opposed by a number of parties. ABC and G.E. Broadcasting Co. argue that no justification for the proposed rule can be found in Section 315 of the Act, since under that Section, the recipient of an equal time opportunity to respond to a candidate's appearance must himself be a legally qualified opposing candidate and not just a representative of a political party or some other appropriate group. To extend a quasi-equal opportunities doctrine to non-election period Presidential appearances would require Congressional amendment of Section 315 because such extension would violate the intent of Section 315, and specifically, would negate the newscast, news documentary, and news interview exemptions to the equal time provisions contained in Section 315(a). Implementation of these proposals would also be a distortion of the fairness doctrine, it is argued, since the fairness doctrine focuses on issues, not individuals or candidates.

15. Those parties filing with the Evening News Association argue that the broadcast appearance of a public office holder should be treated as the appearance of a public official fulfilling the duties of his office, not as the appearance of a partisan spokesman presenting one side of a controversial issue absent some extrinsic evidence to the contrary. Otherwise, the public's right to be informed on important matters by its elected officials would be subordinated to the rights of a particular class (political candidates) to broadcast.

16. NBC believes that both DNC and ACLU have failed to show the necessity of their proposed policies or the present inadequacy of the fairness doctrine as a tool for informing the public on important public issues. Creation of an equal or quasi-equal time right to reply to all public official addresses would, as a practical matter, inhibit the appearance of public officials, NBC maintains. It would also ignore the difference in media use by different officials, as well as the fact that it is possible to distinguish the leadership appearances of an official from his political opinions. NBC also has argued that under present rules Presidential appearances during a campaign for his re-election are subject to the Section 315 equal time requirements, that Presidential appearances in a non-election period are subject to the fairness doctrine and the political party corollary, and that these doctrines are adequate to ensure that the electorate is informed.

17. WGN Broadcasting Co. (WGN) is also opposed to the DNC/ACLU proposals on the grounds that the standard proposed by DNC, that Presidential broadcasts that enhanced the political or personal image of the President would be subject to the rule and require the presentation of opposition programming, is too vague to be realistically applied by licensees; and that the FCC would be inexorably involved in politically sensitive adjudications which should be avoided.

18. Three parties argue that the *Zapple* doctrine should be repealed

altogether. WGN maintains that *Zapple* exceeds the intent of Section 315, which grants equal opportunities only to opposing candidates and not to their supporters. That question, WGN maintains, was settled in *Felix* v. *Westinghouse*, 186 F. 2d 1 (3d Cir. 1950), where it was held that the supporters of a candidate were specifically excluded from Section 315.

19. The law firm of Haley Bader & Potts argues that the *Zapple* doctrine overlooks the fact that the informational needs of the public are of primary importance, and mistakenly confers rights on individual parties. The standards in *Zapple* are too vague for day-to-day application by the licensee, it maintains, and the resultant confusion will tend to inhibit licensee coverage of political matters. Moreover, it argues that *Zapple* unduly restricts licensee discretion in selecting spokesmen and regulating content.

20. The holding of *Zapple* would be acceptable to Public Broadcasting Service (PBS) as a fairness question if the Commission had limited itself to a discussion of the reasonableness of the balance of opposing views afforded by the licensee. PBS is opposed, however, to the extension of traditional fairness concepts of "reasonable balance" to a "comparable time" or "quasi-equal opportunity" doctrine because this restricts licensee discretion and creates artificial barriers to the discussion of controversial issues of public importance. Furthermore, PBS argues that *Zapple* cannot be limited to the two major parties nor to campaign periods only, but instead will engender a spiraling round robin of partisan responses. Several other parties also voiced this particular fear.

21. At the fairness panels, counsel for PBS further developed the foregoing argument by stating that the pricing mechanism and the economic realities of buying time on the commercial networks tend to discourage the broadcast appearances of minority candidates, but that no such economic barrier to access by minority parties exists in the Public Broadcasting Service. Counsel for PBS also argued that in extending quasi-equal opportunities to supporters of a candidate in *Zapple*, the Commission was doing what the Congress had decided not to do when it adopted Section 315 of the Communications Act.

22. Several parties submitted comments on the procedural methods or standards by which the Commission should enforce fairness concepts in the political broadcast area. As previously mentioned, Storer Broadcasting Co. urges the Commission to adopt political broadcasting rules or to develop a political broadcasting primer that would specifically define those situations in which licensees would be required to afford comparable time and which would specify guidelines for the selection of the appropriate opposing spokesmen in order to minimize the confusion that has resulted from the recent series of ad hoc adjudications (*Zapple*, *RNC*, etc.) modifying the traditional fairness doctrine.

23. Those filing with the Evening News Association argue that the FCC frequently oversteps its authority in judging the "reasonableness" of licensee action in the political broadcasting area. The Commission should therefore adopt a "grossly unreasonable" test of licensee con-

duct, and impose penalties only when licensee conduct meets an "actual malice" test.

24. Two other general points raised by commentators were as follows:

A. The G.E. Broadcasting Company believes that the Commission's recent ruling in *In re Rosenbush Advertising Agency*, 31 F.C.C. 2d 782 (1971)[3] should be upheld since it affords discretion in making determination as to how a given licensee's facilities should be made effectively available to candidates or supporters of candidates. Section 315 itself permits a licensee to have discretion in scheduling and the Commission, it is contended, should not restrict this discretion any further in "quasi-315" situations.

B. During the panel discussions, former FCC Chairman Newton Minow discussed the recent study and recommendations of the bipartisan Twentieth Century Fund[4] on this subject. He recommended that the Commission support legislation that would enable the major party candidates in a Presidential campaign to obtain six one-half hour periods called "Voters' Time" in prime time for the simultaneous broadcast on all TV and radio stations of political presentations. Use of this time would be entirely within the candidates' discretion, and, since the beneficiary of these programs would be the American public who would thus receive information pertinent to the election of the President, public funds should be used to buy the time.

IV. DISCUSSION

A. *The fairness doctrine with respect to appearances of the President or other public officials.*

25. The Commission can appreciate why so much attention is focused on the question of the application of the fairness doctrine to Presidential appearances. As the Court noted in *Democratic National Committee* v. *FCC*, C.A.D.C., No. 71–1637, decided February 2, 1972, petition for writ of certiorari filed April 28, 1972, No. 71–1405, O.T. 1971, ". . . the President's status differs from that of other Americans and is of a superior nature," and calls for him to make use of broadcasting to report to the nation on important matters:

> While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and . . . this obligation exists for the good of the nation. . . . (Sl. Op. pp. 26–27)

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[3] The Commission held in *Rosenbush* that a licensee's policy of accepting only paid political advertising of five minutes or longer during a primary campaign was consistent with Commission precedent where the licensee recognized its public interest obligation to make its facilities effectively available to candidates. The licensee had stated its intention to make free time available to candidates for major offices in the primary; planned a one-hour special program presenting the candidates for mayor; and had announced the candidacies for the top three city offices in its regular news programs.

[4] Twentieth Century Fund, Voters' Time (1969).

Because of this use of broadcasting by the nation's most powerful and most important public office, the argument has been made by DNC and by ACLU that there must be special provision for a response by the opposition party—some specific corollary to the general fairness doctrine that ensures equal or comparable use of the broadcast media by an opposition party spokesman.

26. We make two preliminary observations. First, the issue is not whether the American people shall be reasonably informed concerning the contrasting viewpoints on controversial issues of public importance covered by Presidential reports. The fairness doctrine is in any event applicable to such reports—as indeed it is to a report by any public official that deals with a controversial issue of public importance. See Section 315(a). Rather, the issue is whether something more—something akin to equal time—is to be required. The word "required" brings us to our second point. Because our goal is robust, wide-open debate, the Commission of course welcomes any and all programming efforts by licensees to present contrasting viewpoints on controversial issues covered by Presidential addresses. As we stated in our commendation of the CBS series, "The Loyal Opposition", *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 300 (1970); *Republican National Committee*, 25 FCC 2d 739, 745–46 (1970), the more debate on such issues, the better informed the electorate. But the issue is not what programming judgment the licensee makes in this area but, rather, whether there should be an FCC requirement. With this as background, we turn to the proposal that equal time be afforded to an opposition spokesman to respond to a Presidential report.[5]

27. First, there is a substantial issue whether any such Commission prescription might not run counter to the Congressional scheme. In Section 315(a), Congress has specified that equal opportunities shall be applicable to appearances of legally qualified candidates and that in other instances "fairness" be applicable—that is, that there be afforded ". . . reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance." While fairness may entail different things in particular circumstances (see par. 30, *infra*), there is a substantial question whether it is not a matter for Congress to take the discussion of public issues by the President out of the fairness area and place it within the equal opportunities requirement—just as, for example, it was up to Congress in 1960 to take appearances by candidates for President out of equal opportunities and place them under fairness. There is a further troublesome issue here—whether we could create a special fairness rule for Presidential reports but then hold that a report by Governor Reagan in California or Mayor Lindsay in New York, for example, would come only under the "reasonable opportunities" standard of Section 315(a), in the face of arguments that such reports dealt with State or local issues of the greatest importance. Again we do not say that distinctions cannot be made here (compare Section 103(a)(2)(A) of the Federal Election Campaign Act of 1971, 86 Stat. 3 applicable only to Federal offices) but rather raise the issue whether such distinctions are not more appropriately the province of the Congress.

[5] We are not dealing here with Presidential appearances during election campaigns where equal opportunities or *Zapple* (see B, *infra*) would ordinarily be applicable.

28. But in any event, it would not be sound policy to adopt the DNC or ACLU proposals. From the time of the *Editorializing Report*, 13 FCC 1246 (1949), to the present, we have been urged to adopt ever more precise rules—always in the cause of insuring robust debate (e.g., the argument, advanced in 1949 and now repeated by the ACLU, that fairness requires the contrasting viewpoint to follow immediately the presentation of the first viewpoint—see par. 8, *Report on Editorializing by Broadcast Licensees*, *supra*, at pp. 1250–51). However, well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide-open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate. *Editorializing Report*, par. 10, *supra*, at pp. 1251–52. Thus, the arguments for flexibility, rather than rigid mechanical rules, discussed in *Committee for Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292, (1970), remain persuasive. Applying those principles, we do not believe it appropriate to adopt equal time policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring that the public is reasonably informed concerning the contrasting viewpoints best serves the public interest.[6] See *DNC* v. *FCC*, *supra*, Sl. Op. p. 27, (". . . The President is obliged to keep the American people informed and as this obligation exists for the good of the nation, this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party . . ."); *Committee for Fair Broadcasting*, *supra*, at pp. 296–98. The latter case demonstrates that fairness can and does operate to protect the public interest in this important area.

29. In this connection, we note that the Commission believes that the public interest would be served by revision of the equal opportunities requirement so as to make it applicable only to major party candidates, with such candidates liberally defined to include any candidate with significant public support (see *infra*, par. 35); it has also supported, as a less desirable alternative, suspension or repeal of that requirement as to the offices of President and Vice President.[7] It would surely be anomalous for us to seek relaxation of the equal opportunities requirement as to candidates for the office of President, and at the same time to apply a new policy akin to the equal opportunities to Presidential broadcasts not coming within the present statutory equal opportunities requirement. We decline to do so.

B. The Zapple ruling.

30. Our 1970 ruling, *Letter to Nicholas Zapple*, 23 FCC 2d 707 (1970), concerned campaign presentations that did not involve the appearance of the candidate. We pointed out that in some such presen-

[6] For obvious reasons already developed, we strongly decline to make evaluations whether a report by an official is "partisan" or "political" and thus requires rebuttal by a spokesman for the other party, or the contending faction, or whatever. This would drag us into a wholly inadministratable quagmire. See e.g., *In re Complaint of Democratic National Committee*, 31 FCC 2d 708, 712–713 (1971).

[7] See Hearings Before the Senate Communications Subcommittee, 91st Cong., 1st Sess., on S. 2876, p. 50.

tations, the requirements of the fairness doctrine become in effect quasi-equal opportunities. There has been considerable comment on this ruling, but in large part the interest in it may stem from a misunderstanding of the ruling (e.g., that the ruling extends quasi-equal opportunities to all candidates or parties, even of a fringe nature). We can appreciate how such a misunderstanding could arise. The terms we used, fairness and quasi-equal opportunities, are terms of art and have accumulated their own baggage. Thus, quasi-equal opportunities conjures up a notion of all parties—even those of a fringe nature—being treated equally. And fairness carries with it concepts such as *Cullman* (free time if the public has not been informed of the contrasting viewpoint). See, also, *In re Complaint of George F. Cooley*, 15 FCC 2d 828, 829 (1967). But, *Zapple* was neither traditional fairness nor traditional equal opportunities. It was a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in Section 315(a).[8] With this as background, we turn to the ruling.

31. What we were stating in *Zapple* was simply a common sense application of the statutory scheme. If the candidate himself appears to some significant extent (cf. *Gray Communications, Inc.*, 14 FCC 2d 766, 19 FCC 2d 532 (1968)), then the Congressional policy is clear: equal opportunities, which means no applicability of *Cullman* but rather mathematical precision of opportunity. Suppose neither the picture or voice of the candidate is used—even briefly—but rather a political message devised by him and his supporters is broadcast.

In those circumstances, a common sense view of the policy embodied in Section 315 would still call for the inapplicability of *Cullman* [9] and for some measure of treatment that, while not mathematically rigid, at least took on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity? [10] Clearly, these examples deal with exaggerated, hypothetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the *Zapple* ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations

[8] Similarly, the personal attack and political editorializing rules are a particularization of what fairness requires in those situations. See, e.g., *Report on Personal Attack and Political Editorializing* Rules, 32 Fed. Reg. 10303 (1967); *Editorializing Report, supra*, at p. 1252.

[9] In this respect, *Zapple* did not break new ground. In our Report and Order on the personal attack rules (32 Fed Reg. 10303, 10305), we noted the applicability of the Congressional standard in Section 315 to attacks involving candidates, their supporters, or authorized spokesmen, and accordingly made our rules—which result, as a practical matter, in free time—inapplicable to such attacks. See Section 73.123(b), 73.300(b), 73.598(b), 73.679(b).

[10] This example is stated as if the RNC program were the only matter to be considered. Of course in a particular factual situation this may well not be so. See *CBS* v. *FCC, supra*, n. 1, where the DNC program was presented by CBS to offset Presidential speech appearances, and the Court held that this was perfectly appropriate and reversed a Commission holding that to avoid coming within *Zapple*, CBS should have specified the issues to which the DNC was to address itself. This case is of course the law governing similar future factual situations. Thus, each case must be judged in its factual setting, with the licensee having considerable discretion to discharge fairness obligations.

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such as the above (and in view of its nature, the application of *Zapple*, for all practical purposes, is confined to campaign periods). Significantly, because it does take into account the policies of Section 315, the public interest here requires both more (comparable time) and less (no applicability of *Cullman*) than traditional fairness.[11]

Based on practical experience, we stress that in any event—taking into account the sum total of political broadcasts and news-type programs—the American people are reasonably informed on campaign issues, and thus that the basic public interest requirement is being met in this vital area. *Green* v. *FCC*, 447 F. 2d 323 (C.A.D.C.).

32. It follows that *Zapple* did not establish that in the political broadcast field there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. This would clearly undermine any future suspension or repeal of the "equal opportunities" requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 Amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates.[12] We need not belabor the point further. The *Zapple* ruling did not overrule the holding in *Letter to Lawrence M. C. Smith*, 25 Pike & Fischer, R.R.291 (1963).[13]

33. The foregoing discussion—and the general approach that we have adopted in the fairness area—also dispose of the questions raised as to the desirability of extending *Zapple*, codifying it, or otherwise supplementing it with procedural and other trappings (e.g., a seven-day procedural requirement). Because *Zapple* reflects simply a common sense distillation of the public interest in certain political broadcast situations, there is no need to try to codify it or engraft new corollaries onto it. On the contrary, we have concluded that, generally, traditional fairness works better by setting out broad principles and permitting the licensee to exercise good faith reasonable discretion in applying those broad principles. We think that this is true here. Further, we doubt if we will be confronted with a host of *ad hoc* rulings in this field. Most problems should be disposed of at the licensee level by the application of rudimentary concepts of fairness and common sense. Significantly, *Zapple* itself was a ruling on hypothetical questions; there have been very few times when the issue has arisen on concrete cases. As to its extension beyond political broadcasts, the short answer is that it is based in substantial part on Congressional policies applicable to such broadcasts.[14]

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[11] And for the foregoing reasons, we do not believe that we have acted contrary to the legislative history. We have, on the contrary, acted to carry out the Congressional scheme in Section 315.

[12] In view of the 1959 Amendments, it follows that no quasi-equal opportunities doctrine is applicable when supporters or spokesmen for candidates are presented in bona fide newscasts; in this respect, the same general fairness principles that apply to the candidates are equally applicable to their supporters.

[13] We there held that as to fund raising announcements for political parties, fairness does not require equal or comparable treatment for the fringe parties but rather that the licensee can make reasonable good faith judgments as to the significance of a particular party in the area.

[14] Thus, we do not extend *Zapple* to the situation involving ballot issues.

C. Commission efforts to encourage the widest possible coverage of political campaigns.

34. We have considered most seriously what steps we can take in this respect. There would appear to be little we can do on an administrative agency basis. Let us take the most obvious suggestion: That the Commission by rule specify that a certain amount of time be set aside for presentation of political broadcasts on a sustaining basis. See Section 303(b). There are a number of difficult policy issues that would have to be resolved in any such undertaking. But there is, we believe, again an overriding consideration here—namely, that this is truly a matter for Congressional resolution. Congress is aware of the high expense of running for political office, particularly in view of mounting broadcast costs. It has considered a number of worthwhile suggestions here—for example the subsidy plan in the Presidential Campaign Fund Act of 1966 (the now inoperative Long Act) to supply Federal funds to the national party candidates for the Presidency; the Voters Time proposal (see Hearings Before the Senate Communications Subcommittee, on S. 2876, 91st Cong., 1st Sess., pp. 24–34). Its response to this problem has been the Federal Election Campaign Act of 1971 (Public Law 92–225), with its limitations on spending, and requirement for reasonable access for those running for Federal office and reduced rates for all political candidates. We do not see how we can sweep aside this scheme, and substitute our own. Indeed, we could not in any event be truly effective in any such agency action. Take the most important office—the Presidency. Were we to require free time for that office, we would run afoul of the equal time provision; we would find that we had required the broadcaster to devote hours of prime time not just to the significant candidates but also to as many as 15 fringe party candidates (e.g., Socialist Labor, Socialist Worker, Vegetarian).[15] Our point is obvious: Reform here is needed, we believe, but it must come from the Congress because that is the only way it can be effectively accomplished.

35. Congress then can do much. We believe that consideration should again be given to the Voters Time concept or to some scheme akin to that used in Great Britain (i.e., blocs of free time to the major political parties). At the least, we propose again to urge Congress to adopt our proposed amendment to Section 315, limiting to major party candidates the applicability of the equal time provision in partisan general election campaigns. We described that legislation in the following terms (see Hearings Before the Communications Subcommittee on S. 2876, 91st Cong., 1st Sess., p. 48):

> In any general election, other than non-partisan ones, the draft legislation would make the equal opportunities requirement, as to free time, applicable

[15] To give but one example, in 1960 when Congress acted to suspend the equal opportunities requirement for the President and Vice President races, there were on the ballots in the several States 14 different candidates for the office of President: C. Benton Coiner, Conservative Party of Virginia; Merrit Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. R. L. Decker, Prohibition Party; Farrell Dobbs, Socialist Workers Party, Farmer Labor Party of Iowa, Socialist Workers and Farmers Party, Utah; Orval E. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajemski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitley Slocomb, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rept. No. 1928, 90th Cong., 2d Sess., p. 3. Query how effective any agency action in 1960 would have been.

only to major party candidates, leaving fringe candidates coming under the general fairness requirement. It would define major candidates very liberally so as to include any significant candidates—such as Henry Wallace as the candidate of the Progressive Party 1948, Strom Thurmond of the Dixiecrats 1948, or George Wallace in the last election. The figures in the draft legislation are set forth only as possible guidelines—namely, that the candidate's party garnered 2% of the vote in the state in the last election or, if the candidate represents a new party, that petitions be submitted signed by a number of voters equalling 1% of the votes cast in the last election. To obtain time on the national networks as distinguished from individual stations in particular states, there would also be a requirement that the candidate be on the ballot in at least two-thirds of the states.

In short, section 315 in its present operational form is claimed and would appear to inhibit broadcasters from affording free time—and does so, we urge, without any significant practical compensating benefits. The Socialist Labor or Vegetarian candidate does not get free time; rather, no one gets any free time for the political broadcast. Further, and most important, there would appear to be little, if any public benefits from insuring such equal treatment for candidates whose public support is wholly insignificant. We repeat that in defining the major party candidate, we would urge the selection of a numerical figure such as to insure equality to any candidate who did have some significant public support, regardless of what his chances of actually winning might be.

This, by itself, will make a marked contribution to facilitating broadcast presentation of important political candidates.[16]

36. As an alternative, we propose an additional exemption to Section 315(a) to cover any joint or back-to-back appearances of candidates. Additionally, consideration should be given, we think, to the further exemption that we urged upon Congress in connection with our 1970 *Advocates* ruling, 23 FCC 2d 462. We suggested the addition of the following provision to Section 315(a):[17]

> (5) any other program of a news or journalistic character—
> (i) which is regularly scheduled; and
> (ii) in which the content, format, and participants are determined by the licensee or network; and
> (iii) which explores conflicting views on a current issue of public importance; and
> (iv) which is not designed to serve the political advantage of any legally qualified candidate.

37. At the least, we had thought that we could make a contribution here by giving the 1959 exemptions a reasonable construction in line with the broad remedial purpose of Congress. Accordingly, we did so in the recent *Chisholm* ruling, FCC 72-486, decided June 2, 1972. The validity of this construction of Section 315(a) is, however, now in doubt in view of the action of the Court of Appeals in its interim relief Order of June 3, 1972. Until the matter is definitively settled, licensees cannot plan with any certainty, and the area remains confused. This is,

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[16] Thus, in the above noted hearings, we stated (*supra*, at p. 50):
> . . . when freed from the constraints of equal opportunities requirement, there has been no failure on the part of the broadcasters with respect to affording time for the Presidential candidates, and see that that time has been in substantial amounts, and *free*, not just reduced. Thus, in the one instance where the equal time requirement was suspended (1960), the TV networks afforded 39 hours and 22 minutes of free time, including the four hours for the Great Debates. Further, the audience for these debates totalled 280 million, or an average of 70 million viewers per broadcast. We believe that the networks thus effectively discharged their responsibility to inform the electorate in 1960. They have stated that they stand ready to do so in every Presidential election, if freed from the equal time requirement.

[17] See Hearings Before the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee, on H.R. 8721 and S. 3637, 91st Cong., 2d Sess., p. 8.

we believe, unfortunate. We continue to believe that our construction of the exemption in Section 315(a)(2) is sound, meets the pertinent Congressional criteria, and markedly serves the public interest by allowing broadcasting to make a fuller and more effective contribution to an informed electorate. But unless and until that construction prevails upon appeal—or is in any event affirmed by Congressional revisions along the above stated lines—we cannot in good conscience urge licensees to act in this area as if there were no "equal opportunities" pitfalls. There clearly are.

D. Use in bona fide newscasts of film supplied by candidates.

38. One other political broadcast matter which has been brought to our attention merits comment here. Candidates, like many other news sources, have normally issued press releases to the news media containing statements of the candidates, advance copies of their speeches, their future speaking schedules, etc. Media news editors in turn made judgments whether and to what extent to use such material. Increasingly, candidates have been supplying radio and television broadcasters with audio recordings and film excerpts produced by the candidates, e.g., depicting their campaign efforts that day or containing statements of their positions on current issues. Obviously, these excerpts are designed to show the candidate in the best light and, if presented on a newscast, have the added advantage of increased impact or credibility over a paid political presentation. We do not hold that the station cannot exercise its good faith news judgment as to whether and to what extent it wishes to present these tape or film excerpts. If it believes that they are newsworthy, it can appropriately use them in newscasts. But the public should be informed that the tape or film was supplied by the candidate as an inducement to the broadcasting of it.

39. In fact, our rules require such disclosure in these circumstances; that is, "in the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcast of such program . . ." [18] Disclosure of the furnishing of the tape or film is required to be made whether or not a candidate is involved in these types of programs. Accordingly, we take this opportunity to stress to all licensees their duty to comply with the rules and announce that the tape or film was supplied by the candidate in question.[19] If it was edited by the licensee, he may, of course,

[18] Sections 73.119(d), 73.289(d) and 73.654(d), relating, respectively, to AM, FM and TV. See also Section 317(a)(2) of the Communications Act which specifically authorizes the Commission to require announcements disclosing that such matter was furnished.

[19] In order to avoid possible confusion in interpreting this rule in relation to one interpretative example in House Rept. 1800 (86th Cong., 2d Sess.) dealing with Section 317 of the Act and rules thereunder, we should add that we are not attempting to apply the above disclosure requirement to mere mimeographed news releases or typed advance copies of speeches. Example 11 of the House Report (see FCC Public Notice of May 6, 1963, FCC 63–409) states that no announcement is required when "news releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program." We believe, however, that with respect to program material dealing with political or other controversial matters, the requirements of our rules must be followed strictly when audio tape or film is furnished.

add a suitable phrase such as "and edited by the XXXX news department."

IV. CONCLUSION

40. Much remains to be done in the fairness area (Parts II—IV).[20] We have acted here as best we could for the reasons stated in par. 1. The piecemeal approach is thus regrettable but necessary.

As stated, we shall reconsider this most important aspect in light of the conclusions reached in overall proceedings. Our final message is one urging broadcasting to make the maximum possible contribution to the nation's political process. That process is the bedrock of the Republic, and broadcasting is clearly the acknowledged leading medium for communicating political ideas. No area is thus of greater importance ". . . to the public interest in the larger and more effective use of radio." (Section 303(g) of the Communications Act of 1934, as amended).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX A

I. Comments on the applicability of the fairness doctrine to political broadcasts were received from the following parties:

ACLU
American Broadcasting Company
Columbia Broadcasting Company
Democratic National Committee
Evening News Association, et al.
Haley, Bader & Potts
McKenna & Wilkinson
National Association of Broadcasters
National Broadcasting Company
Public Broadcasting Service
Republican National Committee
Storer Broadcasting
United Church of Christ
WGN Continental Broadcasting Company

II. The following parties participated in panel discussion on the applicability of the fairness doctrine to political broadcasts held, before the Commission, on March 29, 1972:

Roger E. Ailes, President, Roger Ailes & Associates, Inc.
Charles A. Wilson, Jr., for the Democratic National Committee
James J. Freeman, Associate Special Counsel, Republican National Committee
Reed J. Irvine, Chairman of the Board, Accuracy in Media, Inc.
Newton N. Minow; Leibman, Williams, Bennett, Baird & Minow, Chicago, Illinois
Harry M. Plotkin, Counsel, Public Broadcasting Service
Paul A. Porter; Arnold & Porter, Washington, D.C.
Allen U. Schwartz, Counsel, Communications Media Committee, ACLU
Rosel Hyde; Wilkinson, Cragun & Barker, Washington, D.C.

III. Oral arguments on all aspects of the fairness proceeding in Docket No. 19260 were made by the following parties on March 30 and 31, 1972:

[20] GE supports the *Rosenbush* ruling (see par. 24(A)). We have considered this issue generally in our recent Notice (Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 37 Fed. Reg. 5796, 5805; Sec. 8, Q. 8), and will reexamine the matter as we gain experience. We thus may clarify our policies here either in a particular case or in our further reports in this Docket.

Michael Valder, on behalf of Urban Law Institute
Bernard Segal, on behalf of National Broadcasting Company
Sam Love, on behalf of Environmental Action
Malin Perkins, on behalf of the American Association of Advertising Agencies
Geoffrey Cowan, on behalf of Friends of the Earth, et al.
Theodore Pierson, on behalf of Combined Communications Corporation, et al.
Joseph A. Califano, Jr., on behalf of the Democratic National Committee
James J. Freeman, on behalf of the Republican National Committee
Edgar F. Czarra, Jr., on behalf of the Corinthian Stations and the Orion Stations
Tracy Weston, on behalf of National Citizens Committee for Broadcasting
J. Roger Wollenberg, on behalf of Columbia Broadcasting System, Inc.
Robert A. Woods, on behalf of National Assn. of Educational Broadcasters
David Lichenstein, on behalf of Accuracy in Media, Inc.
Mrs. Cara Siller, on behalf of Women for the Unborn
Rev. Paul G. Driscoll, Human Life Coordinator of the Rockville Centre (New York) Archdiocese
James A. McKenna, Jr., on behalf of American Broadcasting Companies, Inc.
Ben C. Fisher, on behalf of Commission on Population Growth and the American Future, and Population Education, Inc.
Miles David, on behalf of Radio Advertising Bureau
Absalom Jordan, on behalf of the Black United Front
Peter W. Allport, on behalf of Association of National Advertisers
Dr. Blue Carstenson, on behalf of National Consumer Organizations Ad Hoc Advisory Committee to Virginia Knauer
Leo Perlis, on behalf of Radio and TV Subcommittee of the Ad Hoc National Voluntary Organizations Advisory Committee on Consumer Interests
Warren Zwicky, on behalf of Storer Broadcasting Company
Madalyn Murray O'Hair, on behalf of Society of Separationists
John Summers, on behalf of National Association of Broadcasters
Beverly Moore, on behalf of Corporate Accountability Research Group
Allen J. Potkin, on behalf of Concerned Citizens of West Virginia
Daniel W. Toohey, on behalf of Basic Communications, Inc.
Domingo Nick Reyes, on behalf of National Mexican American Anti-Defamation Committee
Stewart Feldstein, on behalf of National Cable Television Assn.

Dissenting Opinion of Commissioner Nicholas Johnson

I. PRELIMINARY DISSENTING OPINION

We are in the midst of a highly televised Presidential election year. The FCC has just concluded what it calls a "broad ranging inquiry into the efficacy of the fairness doctrine." It has rushed into print with that portion of its findings having to do with the political use of radio and television by the President. And what does it offer? A punt on first down.

Broadcasters are urged voluntarily "to make the maximum possible contribution" to the nation's political process—without being told what that might be, or being required to do anything.

Congress is asked to lead the reform—but is given no new suggestions by the agency ostensibly set up by it to regulate the area.

The FCC is taking the rest of the year off.

The fairness doctrine requires that broadcasters (1) cover controversial issues of public importance, and (2) that they do so fairly, presenting during the course of their total programming a full discussion of the points of view involved.

The political equal opportunity ("equal time") doctrine requires that a broadcaster who affords some time to a candidate for public

office must give an equal opportunity to all other candidates for that office.

The use of television by a President who will probably stand for reelection, but is not yet a declared candidate, falls somewhere in between—and is therefore covered by no doctrine.

All would agree that there will be occasions when the national interest requires that the President be permitted access to the American people by means of national television.

All would also agree, hopefully, that every President is a political animal, the leader of one of two major political parties, and a most persuasive propagandist for whatever point of view he wishes to espouse for whatever reason.

Anything the President says is, by definition, newsworthy, a "controversial issue of public importance." The permanent White House press corps covers his every public word. The President has available to him the ultimate in research capabilities, writers, and production advisors in public relations and television performance. He has a large staff including the Director of Communications and White House Press Office to serve newsmen and media owners in ways designed to encourage them to help him make the most favorable possible impression upon the American people. Techniques of advertising, propaganda and public relations are known, effective, and used—by corporations and elected officials alike. The President is no exception.

In short, the President—as politician, party leader, and head of the executive branch—has an overpowering advantage going into the "marketplace of ideas." He has an advantage over his potential challengers to the Presidency. He has an advantage over the party out of power. And he has an advantage over the other branches of government: the Congress, the judiciary, and the administrative agencies.

The question before us is whether, in light of these disproportionate advantages, the fairness doctrine should take account of *some* opportunity for the American people to hear views other than those of a President seeking reelection. Since most of what the President says and does is, by definition, within the fairness doctrine (controversial issues of public importance), it also follows that there are generally opposing points of view.

Sometimes the President is engaged in an effort to reelect himself or other members of his own party. The opposing party would generally have a different approach to the issues he raises.

On other occasions the President is engaged in a struggle with Congress (or some other branch of government) in an effort to enact (or defeat) a piece of legislation, to take credit (or assign blame) for a national development, or to seize the public's attention away from Congressional criticism of the Administration.

It is fair to say that almost any President, almost all the time, is thinking of a great many things besides "informing the American people" when he takes to television. (This may include such things as relationships with foreign governments as well as domestic politics and Congressional relations.)

Given these realities, what should the fairness doctrine require when the President speaks? An automatic right of reply? By whom? When?

If the President goes on all three networks, in prime time, for free, can something less than that constitute an adequate right of reply—by someone who is decidedly disadvantaged anyway going into a verbal contest with the President of the United States?

Those are the questions this Commission set out to address. They are the kind of questions the Congress set up the Commission to deal with. They are the very questions we dodge—and therefore resolve in favor of the incumbent President.

I dissent, and will have a fuller opinion to follow.

II. INTRODUCTION

The Federal Communications Commission, after long inquiry, study and deep contemplation, has brought forth its long awaited clarifying statement on political broadcasting. For those who expected the Commission to take a great step forward, its policy statement can only be seen as an embarrassing stumble.

In essence the Commission says that the rules governing political broadcasts are not at all what they should be, but that any reform must come through voluntary action or from Congress.

Nearly a year ago, on June 9, 1971, the Commission issued its Notice of Inquiry regarding the fairness doctrine. At that time the Commission stated its intention to institute "a broad-ranging inquiry into the efficacy of the fairness doctrine." 30 F.C.C. 2d 26 (1971). The result is—most generously put—a very narrow response to that inquiry. In fact, the policy found in the Commission's statement does not involve fairness at all. It rather involves the characteristic failure of the Commission to resolve in one proceeding the broad policy questions before it. The majority's action is thus but one more example of the Commission's general tendency to react (in this case to the forthcoming elections) rather than plan.

The reasons given for this separate action with regard to political broadcasting are hardly compelling in light of the lack of action taken by the Commission. The Commission cites *DNC v. FCC*, —— F. 2d ——, 23 P & F Radio Reg. 2d 2165 (D.C. Cir. 1972) and the coming election as requiring this separate treatment of political broadcasting. My understanding of the opinion in *DNC* seems to be somewhat different from the Commission's. In *DNC* the Court stated, "by the end of May or early June—we are assured that the Commission will have handed down new standards to apply to these difficult questions." —— F. 2d ——, 23 P & F Radio Reg. 2d 2165, 2170 (D.C. Cir. 1971). Search as one may, the Commission offers none of the promised new standards. Both the Court and those who will be involved in the upcoming campaign have a right to a clarified Commission policy. Without such a clarification there is simply no reason for separate action on political broadcasting. The failure to take any action is a decision to let present policy stand. However, allowing present policy to stand is simply a "cop-out," a failure to make good on our assurances to the Court, and a blatantly partisan gift to an incumbent President seeking reelection.

III. JURISDICTION AND ABDICATION

The power to regulate political broadcasts may be found in at least two separate parts of the Communications Act. Section 303(g) gives the Commission the authority to "encourage the larger and more effective use of radio in the public interest." Section 315 of the Act (the "equal time" requirements), so heavily relied upon by the majority as a limitation upon changes and clarifications of the fairness doctrine, expressly provides that it does not relieve licensees "from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." In upholding the validity of the Commission's personal attack rule the Supreme Court, quoting this portion of Section 315 stated, "This language makes it very plain that Congress, in 1959, announced that the phrase 'public interest' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial issues. In other words the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard." *Red Lion Broadcasting v. FCC*, 345 U.S. 367, 380 (1969).

From the foregoing it should be plain that nothing in the Communications Act prohibits the FCC from additional regulation in the area of political broadcast fairness. *Red Lion* upheld the Commission's authority to make political broadcast rules complimentary to Section 315. Section 315 not only does not inhibit the Commission from making fairness rules, it affirmatively requires that public issues be discussed. It is the duty of this Commission to make rules that encourage effective discussion on broadcast facilities. *See* Section 303(g).

By today's action the Commission seeks to have Congress do the very job Congress established the Commission to execute.

But abdication of functions is the history of the FCC. Our broad authority over communications began with the power to regulate maritime radio communications. The Coast Guard has today assumed most responsibility in that area. The FCC licenses air-to-ground communications; but the FAA has taken the leadership there—including a budget for communications *research* that exceeds the FCC's entire operating budget. The FCC might have taken the lead in communications satellites policy and research. The Commission abdicated that responsibility to NASA and Comsat. Responsibility for leadership in educational broadcasting, once the frequencies were established, has fallen to the Department of Health, Education, and Welfare and the Public Broadcasting Corporation (PBC). The Commission has not even been able to recommend how public broadcasting should be funded. The Commission, by its inaction, has even abdicated its major responsibility for formulating communications policy to such groups as President Johnson's Communications Policy Task Force and the present Office of Telecommunications Policy. Today's action is yet another abdication—this time to Congress.

Nor is this the first time we've tried to pass the buck back to Congress. It was Congress, not the Commission, that led the way to the Commission's present fees policy, the establishment of PBC, and the Commission's feeble progress in the whole area of land mobile radio.

In fact, it is rare for Congress to receive any thorough and constructive FCC analysis. If the Commission wants Congress to make its regulations for it, the Commission is at least obliged to provide the Congress with proper background reports and "white papers" upon which Congress can make such decisions. Today's statement doesn't even have that excuse. If anything like a white paper on communications gets to the Congress, it does not come from the FCC, but from private or industry groups. The Congress deserves better. The FCC should either live up to its responsibility and regulate broadcasting or admit its unwillingness and close down. And on those occasions when legislation is needed, as in this instance it is not, the Commission should at least give Congress the materials upon which it can act.

I agree with the majority that regulations for political broadcasting are of the utmost importance to the nation. Precisely because they are so important, it is tragic that the Commission is all precatory words and no action. The majority's final message is one urging "broadcasting to make the maximum possible contribution to the nation's political process," because "that process is the bedrock of the Republic, and broadcasting is clearly the acknowledged leading medium for communicating political ideas." But the very purpose of this proceeding was to adopt policies to *insure* that "maximum possible contribution." If the majority could point to a satisfactory past or present record by broadcasting in this area, it could rest on present policies. But it clearly cannot do so. It is up to the Commission to make that "maximum possible contribution." It chose instead to talk to voluntary efforts and reform by the Congress.

IV. PRESIDENTIAL REPORTS

The Commission leaves the President in undisputed control of the nation's broadcast resources. From Roosevelt's fireside chats to the reports of the present President, Presidents increasingly have made extensive use of broadcasting for reports to the nation.

Circuit Judge Skelly Wright has put it well:

> Television has become, in recent years, a principal vehicle by which the President presents to the public his views on important issues of the day. Indeed, no single fact of our changing political life overrides the significance of the expansion of the President's ability to obtain immediate and direct access to the people through the communications media. For the words of the President, speaking as he does both in his constitutional roles of chief executive and commander-in-chief and in his extra-constitutional role as head of his party, carry an authority, a prestige and a visibility that have a counterpart in no other institution.
>
> Moreover, there is an inherent newsworthiness in anything the President says. In addition to his huge direct audiences, in most cases over all nationwide commercial television and radio networks simultaneously, all of what he says is later reported somewhere and something of what he says is reported almost everywhere. In the case of the incumbent administration, these built-in advantages of the presidency in forging public opinion have been used to an unprecedented degree. In his first 18 months in office, President Nixon appeared on network prime time (7:00 to 11:00 p.m.) television as often as Presidents Eisenhower, Kennedy and Johnson combined in a comparable period during their administrations.
>
> In their first 18 months in office, President Eisenhower appeared on prime time network television on 3 occasions, President Kennedy 4 times, President Johnson made 7 such appearances, and President Nixon 14. These figures exclude appear-

ances on regularly scheduled news broadcasts, reports on foreign trips, charity appeals, convention and campaign appearances in the case of President Johnson, and, in that of President Nixon, his Apollo appearances. Remarks by Frank Stanton, President, Columbia Broadcasting System, Park City, Utah, July 10, 1970.

Columbia Broadcasting System v. FCC, 454 F. 2d 1018, 1020 (D.C. Cir, 1971) (text and n. 1).

Opposition spokesmen get nowhere near comparable time. They must rest content to present their views in snatches in newscasts, or as answers on news interview programs.

This brings me to the heart of the unfairness. The President can command all three networks simultaneously for a prime time speech. By so doing he is able to reach audiences of over 55% of the over sixty million television homes. (Significantly, when the President appeared in prime time on only one of the major networks he drew only 14% of the same audience.) Thus, by his ability to use all three networks the President not only increases dramatically his own audience, for *any* message he wishes to disseminate, but he also captures a viewing audience far larger than any of his opponents could ever hope for. Unless this factor is taken into consideration, fairness with regard to the President's use of broadcasting is a joke.

V. VOLUNTARY BROADCASTER ACTION

The majority urges voluntary action by the broadcaster to solve this problem. If it could point to any evidence that this might be successful, I might concur. But the track record negates any hope on that account. Only one of the networks, CBS, became concerned enough about the numerous Presidential reports to do something. It at least once scheduled the series, "The Loyal Opposition"—although it has now apparently dropped the program.[1] I do not want to single out CBS for special criticism. It at least tried. But two points emerge. First, one cannot place reliance on the voluntary efforts of the industry; second, the problem lies in the President's command of all three networks simultaneously. Apparently only governmental action will be able to remedy the resulting unfairness.

VI. CONGRESSIONAL ACTION

Well, says the majority, that's a matter for the Congress. I would agree that it is most desirable (although not entirely necessary) for Congress to act in this area. We must recognize, however—as I am confident the majority knows full well—that it is difficut for it to do so. Congressional regulation of election ground rules necessarily gets bogged down in politics in an election year. Congress reflects the two party system. Every action affecting elections is gauged on both sides

[1] CBS points to an erroneous Commission ruling on the basis of its cancellation. 25 F.C.C. 2d 283 (1970). Frankly, I think that was just an excuse. In any event, whatever the merits of the Commission's ruling, it was easily circumvented—by merely specifying ten or so issues and saying that the DNC could talk about any of them. In any event, the Court reversed, 454 F. 2d 1018 (1971), and still there is silence from CBS about rescheduling the program. The real clue lies in the 1971 testimony of Dr. Frank Stanton when, under questioning, he seemed to acknowledge the need to re-think the value of the program. Hearings on S. J. Res. 209 Before the Communications Subcommittee of the Senate Committee on Commerce, Ses. 91–74, pp. 64–67 (1970).

of the aisle against the vital standard, "Will it help or hurt the chances of our party?" And because Congress is made up of incumbents, the further question surfaces, "Am I voting for a principle that, if extended, will hurt me in my own campaign?" I do not think that I have to belabor the point. In 1964 the party urging that fairness required an answer to a Presidential broadcast was the Republican National Committee, *See, e.g., Republican National Committee*, 40 F.C.C. 625 (1964). The DNC—now so active—was silent. Today we get petition after petition from the DNC concerning the right to answer Presidential appearances. *See, e.g., Democratic National Committee*, 25 F.C.C. 2d 216 (1970).

But if Congress understandably has difficulties acting in this sensitive field, that makes it all the more important that the agency—set up in part because of Congress' awareness of its limitations—not abdicate its responsibilities at this hour. Yet that is what we have done.

I do not believe that Commission action would usurp Congressional prerogatives in any way. Any new policy we adopted as to fairness would not be effective as a practical matter for several months. The Congress, should it choose, would have ample opportunity to review that policy. Under the circumstances, I believe that action by the FCC, now, is the most appropriate and practicable way to promote the public interest.

Finally, our action would not have been inconsistent with the Court's ruling in *DNC v. FCC*, —— F. 2d ——, 23 P & F Radio Reg. 2135 (1972). The Court there expressly ruled that the birth of "a new corollary" was a matter for the agency or the Congress ("Those who advocate the adoption of new standards have, of course, access to both the Commission and the Congress." —— F. 2d ——, 23 P & F Radio Reg. 2d 2135, 2165 (1972)). Further, that case did not address Fairness Doctrine requirements accompanying the simultaneous use of all three networks by the President in a series of reports.

VII. PROPOSALS

The potential solutions are obvious. For example, we could require that whenever there have been two prime time appearances by the President on all three networks, the networks must schedule a prime time program, also to be presented simultaneously over the three networks, in which opposition spokesmen are given the opportunity to present contrasting viewpoints on the issues.

This would be eminently fair. It would give the President greater exposure than his opponents by a ratio of two to one, but it would still prevent the situation from getting totally out of hand, as it is today. It cures the basic defect—that, unlike anyone else, the President dominates the airwaves by getting on all three networks at the same time. Such an approach would also force opposition spokesmen to be truly on their mettle, because they are given the privilege of reaching such an enormous audience. Finally, it would institutionalize a solution, removing this Commission and the Courts from difficult, and narrow *ad hoc* decisions, often made without the benefit of total perspective.

I do not understand the majority position that an opportunity for the other side to be heard will inhibit Presidential reports. Is the majority really arguing that if the American people are given a fair opportunity to hear contrasting viewpoints, the President will be deterred from using the airwaves, that his arguments are so lacking in strength that they cannot withstand healthy debate? That he will speak only if he can dominate the situation? For people who profess to believe that the goal of the First Amendment is to promote robust, wide open debate, this surely is an untenable position.

As for the broadcasting industry, I should think that it would welcome the policy. A large number of broadcasters' fairness headaches have arisen because of the ever increasing use of broadcasting for Presidential reports. *See, e.g., Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970). This would give them a sound base with which to plan their operations, and to answer critics. For example, they could undoubtedly include Congressional leaders, when they find them to be appropriate spokesmen for the contrasting viewpoint—and thus largely meet the objections raised frequently by Senators and Congressmen that they receive quite unfair treatment in comparison to the President.[2]

Such a procedure would cut into the networks' entertainment schedules somewhat. But last year, for example, it would have required half of what the networks gave the President. Surely an industry impressed with the public interest cannot be heard to complain that it is being called upon to make an undue contribution to an informed electorate on the most important issues confronting the nation.

I would in no way propose to limit the networks' wide discretion in selecting spokesmen. It may be that the opposition party would be a poor representative on some issue covered by the President—or that a number of spokesmen rather than one would better illuminate the subject or subjects. Those all could be matters for the networks' judgment; the only restriction is that they must reach a consensus on how to proceed, but that is a restriction they have incurred from acting in concert to present the President.

Nor can it be argued that the Commission lacks the authority to take these specific actions. The statutory command in Section 315(a) is that "resonable opportunity" be afforded. In a case where the President gives prime time reports on all three networks, "reasonable opportunity" requires that at least a contrasting viewpoint be similarly presented, and at no more than a two-to-one imbalance. Significantly, even the Commission recognized that "reasonable opportunity" calls for some response on one occasion when the President gave five speeches in a row on television. See *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 297 (1970). And it did so

[2] In this connection, I believe the Congress could employ self-help—by facilitating the televising of "great floor debates." See S. 4189 introduced by Senator Scott (116 Cong. Rec. 2388 (Aug. 5, 1970)) and described in Hearings on S. J. Res. 209. Before the Subcommittee on Communications of the Senate Commerce Committee, 91st Cong. 2d. Sess., 91–74, pp. 99–107 (Aug. 5, 1970). The federal government has two political branches, the President, and the Congress. The consistent manner in which the broadcast industry has ignored the Congress raises serious questions. Congress has a right to appeal for popular support. The people have a right to hear the divergent views of the Congress. Thus far the broadcast industry has completely ignored this important area of the public interest. My proposal would provide at least a partial remedy for this situation.

even though the main subject of these talks—the Indochina War—was being given wide coverage by the networks on news-type programs. See *Green v. FCC*, 447 F. 2d 323 (D.C. Cir. 1971). The same principle is applicable here. The only difference is that I would not permit the imbalance to go beyond two-to-one, and that I would face up to the critical issue of simultaneous use of all three networks.

The majority claims such a ruling would have to be extended to reports by all public officials. I fail to see why. First, I believe a distinction can be made on the basis of the importance to the nation of the issues covered in Presidential Reports. But even that is not the basis of my comments. The crux is that the President, with increasing frequency, commands all three networks for reports to the nation, and that any application of fairness must take that into account. No other public official, whether a Governor or Mayor, similarly dominates the airways in his state or city. Should that day arise, we will have time enough to consider extending the principle.

In the name of robust, wide open debate, the majority has simply turned its back on the problem—the debate. I also strongly disagree with failure of the majority to require broadcasters to set aside a specified amount of time for political broadcasts by candidates for office. We again have the statutory authority to do so. *See* Sections 303(b) and 315. The statutory scheme calls for the application of time for candidates' use. Indeed, that is the thrust of a recent amendment to the Communications Act. It is now grounds for the revocation of a license if a broadcaster willfully or repeatedly fails to provide reasonable access for the use of his station's facilities to a candidate for federal office. *See* amended Section 312(a)(7). I commend broadcast journalists' efforts to cover the political process; but no one can denigrate the need also to let the candidate speak his piece, uncensored. *See* Section 315(a); 312(a)(7).

In this area as well, the Commission quickly tosses the hot potato back to Congress. Why? Congress has clearly set out the policy, and has given us all the broad rulemaking powers we need, both generally and specifically, to carry out Section 315. *See* Sections 4(l), 303(r), 315(d); *NBC v. U.S.*, 319 U.S. 190 (1943); *FCC v. Southwestern Cable Company*, 392 U.S. 157 (1968); *FCC v. Midwest Video*, —— U.S. ——, 40 U.S.L.W. 4626 (June 6, 1972). Our action would be fully in accord with the Congressional scheme—especially as highlighted by the recent amendment. But, even if not, once again Congress could, if it wished, review the matter.

The Commission cannot and does not assert that there is no need for improved performance. There clearly is, as shown by the legislative history of the 1971 Act and by our figures.

In 1968 in 25 Congressional election contests in which only two candidates were involved, 34% of the area broadcast stations gave some free time to the candidates. In the same year, in 78 races where three or more candidates were running, 45% of the area stations gave free time. In twelve state races with only two gubernatorial candidates, 35% of the stations gave some free time. Yet in nine states in which three or more candidates sought the governorship 48% of the stations allotted some free time to the candidates. (For similar 1960 figures

see, Hearings on Section 315, before the Senate Subcommittee on Communications, 88th Cong., 1st Ses., pp. 70–73, 28–81 (1963)).

Two conclusions are warranted. There is an appalling reluctance on the part of broadcasters to make free time available to candidates under any circumstances. To the extent they do so, however, they tend to give *more* time, not less, when more than two candidates are running. There is, thus, no evidence that repeal of Section 315 would increase free political time—if anything the contrary.

In the instances where data is available, access to the air has not been thwarted by the presence of third party candidates. The requirements of Section 315(a) do not seem to inhibit broadcasters as much as the majority seems to have feared. The real question is why more stations haven't given free time. The answer does not lie in licensee fear of the application of Section 315, but rather in the fact that commercial programming is more in the licensee's economic interest than is exposing political candidates to the public. And yet in light of this the majority relies on voluntary efforts toward reform!

The Commission suggests that Congress should have acted long ago to revise the equal opportunities requirement of Section 315. Perhaps. But the Commission's reliance on *this* allegation as a grounds for no action is simply embarrassing in its irony. It is the very same ground that the Commission has used to criticize broadcasters.

The latter assert they would be willing to give free time if only Section 315 were repealed. While it may be true of the networks in a Presidential race, the record simply does not bear out the argument. Analysis shows that the broadcasters have simply used Section 315(a) as a shield to avoid giving free time.

And that is what the Commission is doing here, to avoid taking a needed action. We *can* act now in an effective way. Many important races do not have fringe party candidates. Even where there are so many candidates as to deter free time to the major party candidates, the public could still be informed by presenting the leading spokesmen for the major candidates. Yet the Commission declines to take any action at all in this area.

I would issue a notice of proposed rulemaking to determine what amount of free time should be afforded in the even-numbered Federal election years, and for off-year elections. After a study of the comments I would adopt a rule that did serve the "public interest on the larger and more effective use of radio"—a standard the majority cites and then ignores.

VIII. OLD POLICIES

The Commission stands by its decision in *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970), and by its rule which requires film supplied by a candidate, even if used in a bona fide newscast, be identified as to its source. While this failure to retreat further is perhaps laudable, it is not a substitute for a policy on political broadcasting. The discussion of *Zapple* offers little that is new to an already clear ruling. The film source rule is simply given additional publicity. As supplements to a broad policy statement it might be a worthwhile discussion. In the Commission's document it is simply out of place.

As long as we are in the reaffirmation business, however, I believe that the Commission should not issue a statement on political broadcasts without reaffirming the position it took in *Cullman Broadcasting Co., Inc.*, 40 F.C.C. 576 (1963). At least with regard to ballot issues, if the licensee presents a sponsored program presenting one position on that issue, and sponsorship cannot be found for contrasting viewpoints, the contrasting viewpoints must be presented at the licensee's expense. Nor should a licensee be allowed to reject a political program simply because he would be required to present both sides, possibly one side at his own expense. See *Capital Broadcasting*, 40 F.C.C. 563, 615 (1963).

IX. CONCLUSION

I find myself nearly a year after the Notice of Inquiry with the same fears that I expressed at that time. Namely, "(1) There is no reason whatsoever to believe that the majority is likely to change a position that has been so forcefully stated in such extreme cases. (2) I am fearful that this 'Inquiry' may well have serious national consequences—whether intended or not—of leaving the law in its current state of uncertainty and inequity through the 1972 Presidential election. (3) Those who now have cases on appeal, or who may be coming before the Commission in the near future, are entitled to the prompt rendition of justice on their complaints." 30 F.C.C. 2d 26, 35.

I have no desire to play "I told you so." I had fervently hoped my predictions would be proved wrong. But, as it turns out, the Commission indeed leaves past inequities untouched, and does nothing to aid the prompt rendition of justice for either present or future complaints. The Commission has failed in its obligation to regulate this important aspect of broadcasting. Having shirked its responsibilities, it seeks to have Congress do the very work Congress established the FCC to do. It neither clarifies old policies nor establishes new ones. It leaves the incumbent President as politician in an unchallenged superior position to all his opponents. In short the Commission has taken forty paragraphs to state what it could have said in one sentence, "In the area of fairness in political broadcasting, the policy of the Commission is to do nothing."

*Since the preparation of this opinion I have waited to exchange views with Commissioner Wiley. Now that his opinion is available, I am disappointed there is almost nothing in his collection of *ad hominem* attacks to which I choose, or need, to respond. His flailing defense of the favorable political implications of the majority's decision is, to put it most graciously, a bit strained. But it is a role in which he seemingly feels comfortable. He believes I, too, would be more effective if only I would consent to play Faust. No doubt that is true—measured by his standards of what is effective use of a man's life. We happen to disagree on that issue as well as the substance before us.

Commissioner Wiley's one meager effort at a substantive defense fails once the facts are known. He suggests the Commission has provided "extensive" aid to Congress in dealing with these issues. In fact, virtually none of the Commission's Congressional appearances, directed mainly to a review of Section 315 in the context of a political campaign, have anything to do with the issues the majority avoids in

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this decision. I would be delighted if Commissioner Wiley would tell me *what* recommendations the majority has given to Congress to deal with the problems it says Congress should now solve. Changing equal time during political campaigns is not the problem here. Commissioner Wiley's high-sounding phrases about deference to elected officials have not stood in the Commission's way to prevent it from acting on matters like cable television, despite our unsuccessful requests for Congressional action. I see no reason why we should ignore our responsibilities in this area either.

SEPARATE STATEMENT OF COMMISSIONER RICHARD E. WILEY

Last month, the Commission issued a First Report in connection with its new broad-ranging inquiry into the Fairness Doctrine. This First Report dealt with political broadcasts and, at least in my judgment as the Commissioner assigned by Chairman Burch to oversee the entire inquiry, was the product of a sincere, conscientious and thorough analysis of the issues in question. The result, again in my opinion, comported with both the intent and objective of the Fairness Doctrine and manifestly was in the public interest. This judgment was apparently ratified by five other Commissioners who voted to adopt the Report. In characteristic fashion, only one Commissioner saw it differently and chose to issue a dissent, a dissent to which this separate statement is specifically and briefly directed.

In an already too familiar style, by innuendo if not direct accusation, Commissioner Johnson has injected unsupported allegations of politics and impropriety into this proceeding by characterizing the Commission's action as a "blatently partisan gift to an incumbent President seeking re-election." The truth—as Commissioner Johnson must know—is that our effort has been completely devoid of partisan considerations or any other narrow appreciation of the goals of this highly important inquiry. The decision was prepared by a non-partisan staff committee whose membership from throughout the various bureaus and offices of the Commission represents widely disparate viewpoints and regulatory philosophies. It was adopted by a bi-partisan Commission which was in no way divided along party lines. The Commission sought with sincerity and honesty to set out a policy which would best serve the public interest over an extended period of time during which, given the normal vagaries of American politics, a number of Administrations—representing in all likelihood both major political parties—might come and go. The fact that only Commissioner Johnson perceived an improper purpose behind our action calls to mind the proverbial saying that, all too often in the company of man, it is he least free of suspicion who so easily questions the motives of his colleagues.

I also take strong issue with the dissenting Commissioner's denigration of the Commission's action as a "dodge", a "cop-out" a "punt on first down" and a Report "rushed into print". Again, the truth—as Commissioner Johnson must know—is that our decision was the result of an extensive treatment of every conceivable issue and point

of view extant concerning the applicability of the Fairness Doctrine to political broadcasting.

The proposal that Commissioner Johnson apparently favors, that an automatic right to reply to Presidential appearances vests in the opposition party or some other presumably appropriate respondent, was discussed and debated over and over again, both in the context of specific prior requests to institute such a rule and again during the course of numerous meetings of the Fairness committee which prepared the First Report in this inquiry. Rightly or wrongly, the Commission chose not to adopt such a proposal. To suggest that it did so without full consideration of the merits, however, is simply and utterly fallacious.

The irony here is that Commissioner Johnson may be guilty of the very transgression which he attributes to the majority. Some of the proposals outlined in his dissent were never advanced before the Commission. Even if our Report could be accurately labeled as "a punt on first down", a matter which I strenuously dispute, such a maneuver is clearly preferable to abandoning the playing field for the sidelines, waiting until the game is over and then second-guessing the manner in which it was played. The predictable result of such a procedure can only be publicity, not progress nor improvement.

Little needs to be added with regard to the merits of Commissioner Johnson's statement that our decision somehow has missed the mark with respect to insuring that the Fairness Doctrine's goal of an informed electorate is attained. Reasonable men may surely differ as to the appropriate applicability of the Doctrine to political broadcasting. In my opinion, Commissioner Johnson's proposals are unworkable without Congressional revision of Section 315(a). In any event, I support the Commission's view that an intelligent application of fairness, rather than rigid rule requirements or arbitrary formulae, better serves our goal of robust, wide-open debate (see majority opinion, p. 11).

Finally, Commissioner Johnson's statement that we have failed to "give Congress the materials upon which it can act" (dissenting opinion, p. 9), ignores the Commission's extensive treatment of the subject (see majority opinion, pp. 15–18). Our recommendations with regard to repeal or amendment of Section 315, the Voters Time proposal, The Federal Election Campaign Act of 1971, additional exemptions to Section 315(a), etc., are a matter of record. No further "materials" were necessary for enactment of The Federal Election Campaign Act and none are needed with respect to other proposals involving Section 315. In any event, the decision of Congress not to institute changes which the Commission may support is no warrant for this agency to arrogate to itself the power and authority which properly reside with the elected representatives of the American public.

While, as set forth herein, I generally disagree with Commissioner Johnson's position in this area, he—as an intelligent member of the Commission—is certainly entitled to his own viewpoint. I think it is unfortunate, however, that in expressing this viewpoint Commissioner Johnson finds it necessary to impugn the motives of his peers

and fellow Commission employees and to assail the integrity of Commission action—especially when, as I have indicated, he really must know better. Sad to say, it is such conduct which, over the course of six long years, has done so much to diminish the credibility and effectiveness within the Commission which his abundant talents would otherwise command. It is my profound hope, vain though it may be, that Commissioner Johnson will devote his remaining time at the FCC and his estimable abilities to help the rest of us realistically solve some of the monumental problems facing the Commission. It is only my view, but sincerely held nonetheless, that this would be a far more noble endeavor than reaping the barren harvest of publicity produced by double-spaced dissents.

F.C.C. 72-651

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Applications of	
GERITY BROADCASTING CO., BAY CITY, ESSEXVILLE, BANGOR TOWNSHIP, PORTSMOUTH TOWNSHIP, HAMPTON TOWNSHIP, FRANKENLUST TOWNSHIP, AND MONITOR TOWNSHIP, MICH.	CAC-48 (MI101) CAC-49 (MI102) CAC-50 (MI117) CAC-51 (MI118) CAC-52 (MI119)
For Certificates of Compliance Pursuant to Part 76, Subpart B of the Commission's Rules	CAC-53 (MI120) CAC-54 (MI121)
and	
In the Matter of Applications of	
GERITY BROADCASTING CO., MIDLAND AND MIDLAND TOWNSHIP, MICH.	CAC-45 (MI122) CAC-46 (MI124)
For Certificates of Compliance Pursuant to Part 76, Subpart B of the Commission's Rules	

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 25, 1972)

BY THE COMMISSION:

1. Gerity Broadcasting Company operates cable television systems in the captioned communities. One headend serves the systems in Bay City and surrounding communities and a second headend serves Midland and Midland Township. Gerity proposes to add to these systems carriage of Television Stations WKBD-TV (Ind., Ch. 50), Detroit and CKLW-TV (Ind., Ch. 9), Windsor, Ontario. The signal of WCMU-TV (ETV, Ch. 14), Mt. Pleasant, Michigan would be carried on the Bay City area systems when the noncommercial educational television station in Bay City is not broadcasting. WWTV (CBS-ABC, Ch. 9), Cadillac, Michigan would be added to the system in Midland Township. In order to obtain authorization to add carriage of these signals Gerity has filed applications for Certificates of Compliance pursuant to Part 76, Subpart B of the Commission's Rules.

Pleadings responsive to these applications have been filed by Meredith Corporation, licensee of WNEM-TV (NBC, Ch. 5), Bay City, Michigan and by Rust Craft Broadcasting Company, Licensee of WKNX-TV, Saginaw, Michigan.[1] Common objections are raised with respect to all of the cable systems involved.

[1] Additional pleadings, filed on behalf of the Commissioner of Baseball, the National Basketball Association, and the National Hockey League, have already been acted upon separately. See FCC 72-646.

2. The communities here involved are located in the Flint-Bay City-Saginaw, Michigan television market (#61). Bay City is the northern most designated community in the market. It, and the surrounding communities that Gerity serves, have a total population of 92,066 according to the 1970 U.S. Census.[2] Midland and Midland Township are located about twenty miles to the west of Bay City and have a combined population of 37,695.[3] All of the systems are presently carrying the following signals:

WUCM–TV (ETV, Ch. 19), Bay City, Mich.
WNEM–TV (NBC, Ch. 5), Bay City, Mich.
WKNX–TV (CBS, Ch. 25), Saginaw, Mich.[4]
WJRT–TV (ABC, Ch. 12), Flint, Mich.

Additionally, WCMU–TV (ETV, Ch. 14), Mt. Pleasant, Michigan is carried on the systems in Midland and Midland Township and the signal of WWTV (CBS–ABC, Ch. 9), Cadillac, Michigan is carried in Midland.

3. Gerity indicates that the signal carriage proposed is consistent with the Rules in that (a) WCMU–TV is a noncommercial educational television station, the carriage of which is permitted under Section 76.63(a) (as it refers to Section 76.61(d)) in the absence of objection, (b) WWTV is significantly viewed in Midland County as shown by Appendix B to the *Cable Television Report and Order*[5] and is thus entitled to carriage in Midland Township pursuant to Section 76.63(a) (as it refers to Section 76.61(a)(5)), and (c) that WKBD–TV and CKLW–TV are independent television stations whose carriage is permitted under Section 76.63(a) (as it refers to Section 76.61(b)(2)).

4. In attempting to show compliance with the access channel and other nonbroadcast cable service requirements of the rules (Section 76.251), Gerity asks that we take into consideration the fact that the Bay City area systems have only one headend and are technically integrated into a single operating unit and that the Midland and Midland Township systems also have only one headend and are similarly technically integrated. With respect to each of these two conglomerate systems, Gerity states that it will, with the addition of converters at subscriber receiving terminals, have the capacity to deliver 120 MHz of bandwidth, that this will provide more than one Class II or Class III channel for each Class I channel delivered, and that its plant has been designed in each instance so that, with the addition of plug-in, up-stream amplifier modules, it can be altered to provide non-voice return communication. On each of the two conglomerate systems, Gerity indicates that it will

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[2] Populations of the individual communities are as follows:

Bay City	49,449
Essexville	4,990
Hampton	6,868
Bangor	1,708
Portsmouth	4,088
Frankenlust	2,032
Monitor	8,743
Total	92,066

[3] Midland has a population of 35,176 and Midland Township a population of 2,519.
[4] The call letters of this station were recently changed to WEYI–TV.
[5] FCC 72–108, 37 Fed. Reg. 3252.

have available cablecast production facilities and that channels will be made available for leased access purposes. To the extent that the Rules would otherwise require that separate public, education, and local government access channels be established in each of the separate communities involved, Gerity requests a waiver of the Rules, citing Paragraph 89 of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*.[6] Gerity urges that it would not be technically feasible to provide separate channels for each community with its existing facilities, that it was not the Commission's intent to require the reconstruction of systems such as this, and that separate channels are for the foreseeable future unnecessary. With respect to the systems in the Bay City area it is said that they have a political, social, and economic community of interest, and that some of the townships involved will have relatively few subscribers. The existence of different demographic characteristics among the communities that would call for separate channels is discounted. With respect to the Midland and Midland Township system, Gerity indicates that it has the channel capacity for separate access channels in each community and that it will make these channels available when a need therefor arises, but doubts the necessity for separate channels. With respect to the Bay City area systems, Gerity undertakes to make all its nonbroadcast channels, including some now used for automated services, available for access purposes "when demand for access reaches a level sufficient to warrant the activation of additional access channels pursuant to Section 76.251(a)(8)."

5. In pleadings responsive to these applications Meredith Corporation and Rust Craft Broadcasting do not object to carriage of WCMU–TV or WKBD–TV but request that carriage of CKLW–TV not be permitted or that WXON–TV be substituted in place of CKLW–TV. Meredith also opposes carriage of WWTV in Midland Township. With regard to carriage of WWTV, Meredith states only that plans to improve the facilities of WKNX–TV, Saginaw "eliminates any need for carriage of a duplicative CBS–ABC outlet (WWTV) from Cadillac in the Midland area which is well beyond the station's 35-mile zone (footnote omitted)." With respect to carriage of CKLW–TV, Meredith and Rust Craft very generally allege that application of the rules to this market will result in carriage of a proliferation of television signals, that the market because of its unique characteristics warrants special consideration, and that carriage of CKLW–TV is not needed. Carriage of WXON–TV, it is said, would have less impact and would assist UHF development. Rust Craft indicates that it is proposing to expand the facilities of WKNX–TV and that in making the decision to do this it relied on that part of the Commission's August 5, 1971 "Letter of Intent"[7] that indicated the possibility of special relief for certain markets designated in Appendix B to that letter. Reference is also made to Rust Craft's petition for reconsideraion of the *Cable Television Report and Order*. This petition also noted Rust Craft's plans to improve the facilities of WKNX–TV, its need for parity with other stations in the market, and its alleged reliance on the "Letter of Intent." It is sug-

[6] FCC 72–530, 37 Fed. Reg. 13847.
[7] 31 FCC 2d 147 (1970).

gested, in very general terms, that if special relief is not granted "the economic viability of WKNX–TV will be threatened."

6. The signal carriage proposed by Gerity Broadcasting is in all respects completely consistent with the recently adopted cable television rules. Those objecting to a grant of this application have not contended otherwise. We further find nothing in their comments that suggest that the rules are not appropriate for the communities involved. Nor, as petitions for special relief, do these pleadings come close to containing that specificity of fact, showing injury to the public, sufficient to meet the "substantial burden" required for special relief to be granted.[8] They will accordingly be denied.

7. We also find Gerity's non-broadcast channel proposals to be consistent with the Rules (Section 76.251), except with respect to the question of whether separate access channels should be required in each community. With respect to this question, Gerity has undertaken to make available one public access, one educational access, and one local government access channel and to make available all of its other non-broadcast channels for these access purposes as the demand therefor develops. To the extent that additional channels beyond these would otherwise be required, a waiver of the rules is requested. Because the Midland and Midland Township systems have sufficient channel capacity to provide for all access requirements mandated by the Rules, there does not appear to be any question with respect to compliance by those systems. With respect to the systems in the Bay City area, Gerity would need a total of 21 channels to provide a separate public access, educational access, and government access channel for each of the seven communities that are served from the same headend. In light of the small populations of some of these communities and the fact that the system is already in operation we do not think that this should be required. The Bay City systems have a 20 channel capacity of which only six channels are to be used for carriage of broadcast signals. By displacing certain automated services, 14 channels could be made available for the specified access purposes to serve all of the seven communities involved. Although we are inclined to agree with Gerity that it is unlikely that there will be uses for all of these channels in the near future, we think that Gerity, in accordance with its undertaking, should be required to make these additional channels available as demand develops so that there will be compliance with the spirit to the rules to the extent possible. With this condition and considering the present circumstances involved, the requested waiver will be granted. Gerity will be required to immediately make available one channel for each of the specified access purposes and, consistent with its undertaking, to make additional channels available for these purposes as demand develops. We are not convinced, however, that operation as proposed will continue to be appropriate as the systems in the Bay City area become more fully developed. We will, accordingly, limit the duration of the waiver to the term of the certificates granted.[9] Before any

[8] In paragraphs 112 and 113 of the *Cable Television Report and Order* we discussed the showing that would have to be made before additional restrictions limiting signal carriage would be imposed.

[9] All are for terms of less than five years.

new certificate will be granted for these systems, a full showing as to the adequacy of the channels made available and the need for additional channels and local production facilities in the separate communities involved will be required.

8. With this waiver, having found the proposed signal carriage to be consistent with the rules, and compliance with the franchise standards provisions of the rules not being required at this time pursuant to the proviso to Section 76.31(a), we find the captioned applications to be consistent with the Rules.

Accordingly, IT IS ORDERED, That the captioned applications for Certificates of Compliance filed by Gerity Broadcasting Company ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-636

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GREEN COUNTRY BROADCASTING CO., INC., VINITA, OKLA. Requests: 1470 kHz, 500 w, Day (Facilities of KVIN, Vinita, Okla.)	File No. BP-19163
P B L BROADCASTING CO., VINITA, OKLA. Requests: 1470 kHz, 500 w, Day For Construction Permits	File No. BP-19233

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 25, 1972)

BY THE COMMISSION: COMMISSIONER HOOKS NOT PARTICAPATING.

1. The Commission has before it the request of the Green Country Broadcasting Co., Inc. (Green Country), for an extension of temporary authority to operate KVIN, Vinita, Oklahoma, granted pursuant to section 309(f) of the Communications Act of 1934, as amended, on April 20, 1972. *Green Country Broadcasting Co., Inc.*, 24 RR 2d 143. Also before the Commission is an opposition to Green Country's request for extension filed by P B L Broadcasting Company (P B L), P B L's request for authority to conduct its own temporary and interim operations of the Vinita station, Green Country's reply to P B L's opposition, and P B L's response to Green Country's reply.

2. Simultaneously with the action authorizing the temporary operating authority, the Commission released a public notice (37 FR 8482) fixing May 30, 1972, as the date by which any competing application must be tendered in order to receive concurrent consideration with the application of Green Country. In response to that notice P B L tendered its application on May 30, 1972, and the application was accepted for filing as of that date. Accordingly, it appears that a comparative hearing must be held to determine which of the two pending applications for regular authority to operate a station in Vinita should be granted.

3. The temporary authorization was issued to Green Country to avoid the loss of the only aural broadcast service in Vinita. Green Country now urges that the extension of the authorization would similarly avoid the loss of broadcast service in the community and would also assure uninterrupted service while Green Country and P B L determine the precise nature of any proposal for interim authority as was contemplated in the order authorizing temporary authority.

4. In opposing Green Country's request for an extension of temporary operating authority, P B L takes the position that the Communi-

cations Act provides for temporary operating authorizations only if (1) a grant of the application is authorized by law and (2) extraordinary circumstances requiring emergency operations in the public interest are shown. According to P B L, the Commission would be absolutely precluded from granting Green Country's application and must provide a full hearing to determine which application would best service the public interest.

5. P B L argues that Green Country's request is based upon allegations of extraordinary circumstances requiring emergency operation in the public interest. P B L asserts that the facts refute this claim and lists twenty-six AM and FM broadcast stations as shown in the 1972 edition of *Broadcasting Yearbook* which are licensed to serve communities in the Vinita area which, according to P B L embrace northeastern Oklahoma, southeastern Kansas, and southwestern Missouri. In addition, P B L claims that four television stations in Tulsa, Oklahoma, and three television stations in Joplin, Missouri, serve Vinita. P B L also states that daily newspapers are published in Vinita, Bartlesville and Muskogee, all in Oklahoma, and in Joplin. According to P B L, Tulsa has two daily newspapers. P B L draws attention to the fact that temporary authorization or interim operating authorizations are generally not permitted where one of the proposed applicants for regular authority is not a participant.

6. P B L states that negotiations and discussions have been held between the parties and their counsel regarding the possibility of a joint interim operation but believes that such a proposal is not possible on the terms offered by Green Country. P B L concludes that there is no likelihood that an agreement could be reached regarding joint interim operation at this time or in the near future. P B L argues that, with the filing of its application, changed circumstances render Green Country's request for an extension of its temporary authority contrary to the provisions of the Communications Act, applicable rules and precedents, and the circumstances of this case.

7. Having urged the impropriety of Green Country's operation, P B L requests that it be granted temporary operating authority [1] and interim operating authority. P B L asserts that the Commission should consider the requests for interim operation on their own merits based on the representations made in the applications for construction permit, and, if the Commission is unable to determine which of the requests should be granted, Green Country's temporary operating authority should be terminated. P B L's comment on any alternative procedure is as follows:

> [T]he Commission will have permitted its rules and regulations and principles of fundamental fairness to be circumvented merely by the purchase of physical facilities by one of the applicants prior to a hearing on the merits of applications to determine which if either of the applications should be granted.

8. Green Country replied only to so much of P B L's opposition that opposes the extension of temporary authority, and Green Country indicated that it soon intends to file its proposal for joint interim op-

[1] In its latest filing P B L seems to disclaim having requested temporary authority. STA is the term used. However, in both its opposition and in its request for temporary and interim authority, both types of authority are explicitly requested.

erating authority. In response to P B L's assertion that the pendency of a competing construction permit application deprives the Commission of authority to extend temporary operating authority, Green Country points to a similar instance in which the Commission recognized that such a circumstance does not prevent an extension such as requested here. *Community Radio of Saratoga*, 2 RR 2d 1099. Green Country urges that the enumeration by P B L of twenty-six AM and FM stations, among other media, does not constitute evidence that circumstances have changed since the Commission's authorization of temporary operation of KVIN on April 20, 1972. Green Country points out that P B L's position that the facts do not dictate that Green Country's authority should be renewed is inconsistent with its position that temporary operating authority (despite subsequent disclaimer—see Note 1, *supra*) should be granted to P B L.

9. Finally, in response to Green County's reply, P L B states: "circumstances have been shown which render it inappropriate for an STA (presumably P B L means temporary operating authority) to be granted at this time, even on an initial basis." Then, contrary to its previous representation P B L states: "P B L has not applied for an STA."

10. With respect to P B L's allegation of changed circumstances, the change brought about by the filing of P B L's application was anticipated and reasonably expected. To the extent that P B L seems to imply that its opposition reveals for the first time that there are radio stations in Miami, Claremore, Bartlesville, Muskogee and Tulsa, Oklahoma, Coffeeville, Kansas, and Joplin, Missouri, and that there are television stations in Tulsa and Joplin, the Commission assures P B L that the Commission was aware of the existence of those stations on April 20, 1972. The Commission has previously been apprised of the existence of a newspaper in Vinita when notice of the publication of the filing of each application was received, and was not unaware of the possible existence of other printed media in the area. Although the Commission has not conducted extensive studies to determine the quality of signals provided by the stations listed, we will assume, *arguendo*, that any resident of Vinita can receive any of the stations listed at will and that there is wide circulation of various newspapers in Vinita. But this is all beside the point. The Commission's finding in granting the temporary authorization was that the delay in granting such authorization would result in the loss of the only local aural service in Vinita. The Commission was and remains concerned about employing all feasible means to avoid interruption in existing service. The Commission finds at this time that the disruption in local service would disserve the public interest.

11. It is not clear whether by P B L's disclaimer of requesting an STA (presumably temporary operating authority), it has abandoned its previous request for such authority. It seems clear now that it is requesting interim operating authority without the participation of Green Country, but P B L has provided no firm basis upon which any such authority can be granted. Rather, it has indicated that it has rejected Green Country's overtures to participate in a joint operation on Green Country's terms. It now proposes, apparently unilater-

ally, to take over Green Country's facilities by leasing them at 2 percent of the appraised value which it appears to believe is substantially less than Green Country paid for those facilities. There is no indication that Green Country is prepared to accept such terms, and, indeed, Green Country has stated that it will submit a proposal for joint interim operation. Under the circumstances, the Commission is not prepared to authorize a nonparticipating interim operation by either applicant.

12. The Commission does not agree with P B L's contention that the pendency of its application for construction permit precludes an extension of Green Country's temporary operating authority. Section 309(f) of the Communications Act clearly authorizes the extension requested if the Commission finds that extraordinary circumstances exist requiring emergency operation in the public interest. We find that the maintenance of local service in Vinita provides such circumstances. *Community Radio of Saratoga, supra.*

13. We find that one further factor supports our determination that service in Vinita should continue without interruption. P B L has indicated that it apparently has no intention of participating in a joint interim operation. The Commission, however, is not willing at this time to abandon its expectation that, during the extension of Green Country's authority, to which there is no valid bar, some means will develop which will permit the continuation of local broadcast service in Vinita.

14. With respect to P B L's assertion that interim operating authority should be instituted at this time and that an alternative procedure would be a circumvention of fundamental fairness, the Commission does not reach the question of interim operation at this time for the reasons stated above. The Commission assures P B L that in all stages of this proceeding, both applicants will be accorded a full and fair hearing.[2] In the meantime, pending further consideration of any proposal for interim operating authority, the temporary operating authority will be extended.

15. Accordingly, IT IS ORDERED, That the request for temporary and interim authority to operate KVIN of the P B L Broadcasting Company, IS HEREBY DENIED.

16. IT IS FURTHER ORDERED, That, pursuant to section 309(f) of the Communications Act of 1934, as amended, the extension of temporary authority to operate facilities of station KVIN requested by the Green Country Broadcasting Co., Inc., IS HEREBY GRANTED for an additional period of ninety (90) days to expire on October 17, 1972.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] Of course, in this case and all similar cases, temporary operation conducted by Green Country under the original authorization and under the authorization now being granted will not be considered in any comparative hearing between these two applicants for regular operating authority.

F.C.C. 72-674

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CHARLES A. HASKELL, MAX G. BROOKS AND ALVIN G. FLANAGAN, AS COEXECUTORS OF THE ESTATE OF JOHN C. MULLINS, DECEASED (ASSIGNORS) AND MISSION DENVER CO. (ASSIGNEE) For Assignment of License of Station KBTR Denver, Colo.	File No. BAL-7409

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released July 28, 1972)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT, COMMISSIONER JOHNSON DISSENTING, COMMISSIONER HOOKS NOT PARTICIPATING.

1. We have before us: (1) the above-referenced application for assignment of the license of Station KBTR from the co-executors of the estate of John C. Mullins to Denver Mission Company; (2) a Petition to Deny, filed by Lakewood Broadcasting Service, Inc.; (3) a Petition to Deny filed by Colorado Citizens for Broadcasting *et al.*; (4) a Request for Official Notice filed by Lakewood Broadcasting Service, Inc.; and (5) responsive pleadings.

2. Petitioner Lakewood Broadcasting Service (hereinafter referred to as Lakewood) is the licensee of KLAK, Lakewood, Colorado, which adjoins Denver. KLAK has a country and western format, and competition between it and KBTR for advertising revenues and audiences would be increased by assignee's proposal to adopt a country and western format. The other petition has been filed by a number of groups and individuals, including the Colorado Citizens for Broadcasting, the Denver Area Association of the Blind, the Colorado Federation of the Blind, the Colorado Springs Council of the Blind, the Colorado Media Project, and individual petitioners such as local clergymen, a former U.S. Attorney for Colorado, a local symphony conductor, etc. We will refer to this petitioning group as Citizens. No substantial question has been raised concerning the standing of either Lakewood or Citizens, and we find that both petitioners are parties in interest under Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1).

3. KBTR is being sold because of the death of John C. Mullins (former President of Mullins Broadcasting) and the need to liquidate assets to raise funds for estate and inheritance taxes. In addition to

KBTR, Mullins also owned television station KBTV in Denver and Mullins Outdoor Advertising, Denver's largest billboard sign company.[1] KBTR operates on 710 khz, 5 kilowatts power, and provides a 24-hour service to Denver area listeners. KBTR has tried a number of different formats since Mullins took over ownership in 1961. Since 1967, KBTR has provided the only 24-hour "all news" format to the Denver area. Mission Denver Co., (hereinafter referred to as Mission) proposes to acquire the KBTR license. Mission's proposal to change the "all news" format of KBTR to country and western provides the chief basis for both petitioners' objections to the application.[2]

4. The most recent renewal application for KBTR, filed in January 1971, shows the following percentages of non-entertainment programs carried in the preceding license period and proposed by Mullins for the current period:

	Past	Proposed
Hours of operation	168	168
News, percent	70	70
Public affairs, do	5	5
All other, do	.002	0

That same application stated KBTR had 33 full time and 6 part time employees, of whom 20 full time and 3 part time employees were on the news staff. KBTR subscribes to several wire services, is an ABC information Radio Network affiliate, has a variety of technical equipment to aid in newsgathering, and a stringer system of providing news from key cities throughout Colorado and Wyoming. KBTR devotes 50% of its news time to local news, and broadcasts several locally produced public affairs programs.

5. While under Mullins ownership, the "all news" format of KBTR was heavily promoted over the sister television station (KBTV) in Denver and Mullins' billboards. While net sales expanded steadily from 1967 to 1971, heavy operating expenses remained fairly constant (never below $450,000 per year), with the result that Mullins sustained substantial losses in 1967 through 1969, with only modest profits realized in 1970 and 1971. Audited Statements of Expense and Income, which are in accord with annual financial reports to the Commission, show the following figures for 1967 through the first 9 months of 1971 (Appendix H, Mission's Opposition to the Colorado Citizens' Petition to Deny, Affidavit of Mr. V. James Moore, Vice-President and Secretary-Treasurer of Mullins Broadcasting):

	1967	1968	1969	1970	9 months 1971
Net sales	$186,912	$333,627	$426,657	$618,947	$479,642
Operating expenses	525,898	469,690	547,629	572,512	458,645
Operating profit (loss)	(338,986)	(136,063)	(120,972)	46,435	20,997
Depreciation and other	18,549	13,383	17,553	16,147	10,545
Remainder	(357,535)	(149,446)	(138,525)	30,288	10,452

[1] Because of the one-to-a-market rules, KBTV has been sold to a different buyer.

[2] Additionally, the Commission has received over 40 letters protesting the proposed format change.

6. Excluding non-cash items under "Depreciation and Other" (*supra*), KBTR had a cash flow which is reflected in the entry for "Operating Profit (Loss)". KBTR's parent company thus had to provide cash of $338,986, $136,063, and $120,972 for the years 1967 through 1969, respectively, to enable KBTR to meet expenses. Accordingly, KBTR has sustained in the period indicated a cumulative net operating loss of $528,589 while operating under the "all news" format.[3]

7. All of Mission's stock is owned by Mission Broadcasting Co., which also owns and operates radio stations in San Antonio, Texas; Miami, Florida; and Charlotte, North Carolina. Jack Roth—Mission Broadcasting's sole stockholder—has been a broadcaster all his adult life. Exhibit 1 of assignee's portion of the application sets out the history of the Mission stations and lists news broadcasting awards received by the San Antonio stations. This exhibit also lists editorials broadcast over the San Antonio stations and involvement by these stations in community affairs.[4] Mission proposes a "balanced program format" for KBTR, approximately 80% of which will be devoted to modern country music. Hours of operation and percentages of non-entertainment programs proposed by Mission are as follows:

Hours		163
News	percent	10.0
Public affairs	do	2.0
All other	do	3.0

Mission's news staff will consist of 3 full time employees (a News Director and two newsmen), and additional news personnel will be added as the facility grows. (Exhibit 13, application).

8. After the proposed format change at KBTR became public, two Denver area stations expanded their news programming by offering "continuous" or "block" news during prime listening hours. KGMC, Englewood, Colorado, is a daytime station which operates on 1150 khz at 1 kilowatt power. It describes itself as the "exclusive 'Talk' station in the Englewood-Littleton-Denver area". Shortly after the KBTR application was filed, KGMC notified the Commission that in view of the format change, KGMC proposed to expand news programming from a present 13.2% of total programming to 43.57%. This was to be done by providing a "Continuous News" service during the prime listening hours of 6 to 9 am, 11:30 am to 1:30 pm, and 4 to 6 pm. KGMC felt the combination of Continuous News and Talk had prospects for attracting audiences, while at the same time avoiding the repetition of around the clock All News. (Attachment A). On March 11, 1972, KGMC notified us it had fully put into effect its "Continuous News" format in the prime morning and evening hours, and partially in the noon hours (with full implementation expected shortly). KGMC also informed us its local news staff had been increased substantially, and that news coverage had been expanded to offer news and background reports on local social problems. (Attachment B).

[3] The cumulative loss would be increased by slightly over $76,000 if depreciation is added, and—by Mr. Moore's calculations—is even higher if interest for the cost of funds needed to sustain the operating losses is added. In our judgment, the cash flow figures afford the best index for the actual losses sustained by Mullins Broadcasting.

[4] Exhibit 1 appears as Appendix A to Mission's Opposition to the Lakewood petition and Appendix E to its Opposition to the Colorado Citizen's Petition.

9. KOA–AM, Denver, Colorado, is the second area station which has expanded news coverage. KOA–AM is a twenty-four hour 50 kilowatt clear channel station, licensed to a subsidiary of General Electric Company. On March 6, 1972, KOA increased news programming from a present 17% of total programming to 21% (an increase of almost 23% within the "news" category). KOA–AM now carries "news blocks" from 6:30 to 8:30 am, 12 noon to 1:00 pm, and 4:30 to 6:15 pm. KOA states that because of this change, additional newsmen have been hired and a substantial investment has been made in acquiring newsgathering equipment and studio facilities. (Attachment C).

10. Both petitioners oppose changing KBTR's "all-news" format. Citizens first argues that under the present format, news is available any hour of the day without searching the dial. This service is especially useful to persons such as drivers, housewives, and the blind. Under Mission's proposal, this service would be drastically curtailed, with an alleged 86% diminution in KBTR's news programming and, allegedly, at least a 35% drop in news time in the listening area. Citizens further argues KBTR's large staff would be disbanded, local news coverage would decrease substantially, and two of the stations wire services would be dropped. Moreover, KBTR's extensive equipment and news gathering facilities, including the stringer system of reporters in key cities, would be lost to the public. (Citizens' petition, pp. 5 to 12).

11. Citizens next argues Mission has failed to justify the reduction in service, contrary to our ruling in *City of Camden*, 18 FCC 2d 412, at 423. Here, it is first contended Mission's ascertainment of community problems is defective because Mission's evaluation of problems ascertained by interviewing community leaders is not set out, and because community leaders who were interviewed by Mission were not informed of the format change. Citizens resurveyed 60 of the 79 leaders interviewed by Mission. Petitioner alleges that 29 of the resurveyed leaders claimed Mission had not told them of the format change, only 15 were certain they had been told, and others were not certain. It is further claimed the reports on interviews of community leaders failed to state views of those who opposed the format change. All of this, it is claimed, suggests purposeful concealment on Mission's part, and is incompatible with *Camden, supra*, and *Citizens Committee to Preserve the Present Programming of the "Voice of the Arts in Atlanta on WGKA–AM and FM" v. F.C.C.*, 436 F2d 263. (Citizens' petition, pp. 14 to 17). Citizens also contends the eight significant community problems which Mission ascertained (Application, Exhibit 12, p. 8) do not comport with Mission's own survey, apparently because problems mentioned most frequently in the interviews appear lower in Mission's list than those less frequently mentioned problems. (Citizens' petition, pp. 17 to 19). Citizens further contends (petition, pp. 19–20, 22) Mission's proposed programming does not deal adequately with ascertained community problems. Petitioner notes here that although Mission considered drug abuse a top problem, no specific program (Application, Exhibit 8, pp. 8 to 11) is directed to drugs. Nor are problems such as poverty, transportation and pollution mentioned in program proposals. Here, petitioner also

109-004—72——6

takes issue with the reasons Mission has advanced in support of its claim program diversity will be increased in Denver by approval of the application, i.e., through establishment of a 24-hour country music service, addition of a new editorial voice in the community, and through the program proposals listed in Exhibit 8. Petitioner argues Denver gets adequate country music from KLAK (Lakewood's) station and a Denver area station in Arvada, and Mission would merely be substituting its allegedly inadequate voice for Mullin's. Finally, Citizens contends the proposals of other area stations to increase news programming to compensate for KBTR's format change is inadequate, because increases will be piecemeal and in prime hours when there is an abundance of news, but will lack the range and depth now available from KBTR.[5] (Citizens' petition, pp. 22 to 23).

12. Lakewood makes substantially the same points, in less detail. In addition to relying on *Citizens Committee, etc., supra*, it refers to the Commission's discussion of that case in the Ascertainment Primer, where we pointed out that substantial changes in format would be scrutinized in light of *Citizens Committee* and applicants should be prepared to support format changes "... in light of the needs and tastes of the community and types of programming available from other stations." *Primer on Ascertainment of Community Problems by Broadcast Applicant's* 27 FCC 2d 650, 36 Fed. Reg. 4092, 4103. Lakewood claims that in view of this, the court's decision in *Citizens Committee, supra*, and its order in *The Citizens Committee to Preserve the Present Programming of WONO(FM) v. FCC*, (Order No. 71-1136, D.C. Cir., May 13, 1971), a hearing is needed. (Lakewood petition, pp. 3 to 6). Finally, Lakewood contends there are material questions respecting Mission's financial qualifications, because of Mission Broadcasting's proposal to supply working capital to Mission. It is contended Mission Broadcasting's estimate of future profits is not based on sufficient data, and no showing has been made Mission's other stations will not require a portion of the predicted cash flow. (Lakewood Petition, pp. 7 to 8). In this connection, Lakewood has filed a "Request for Official Notice", asking us to note that Mission has filed a petition to deny a pending assignment application for Station KADX(FM), Denver. In that petition, Mission alleges it had earlier contracted to purchase KADX(FM), and now has a lawsuit against the KADX (FM) seller in which it seeks specific performance of the alleged contract. Lakewood contends the alleged contract had a bearing on Mission's financial qualifications, but the KADX(FM) contract was not mentioned in Mission's opposition to the Lakewood petition, even though the opposition was filed a month after the alleged KADX (FM) contract was concluded. Lakewood also contends Mission failed to inform the Commission of the alleged contract, which raises a question of whether Mission has failed to comply with Section 1.65 of the Commission's Rules.

13. Mission's oppositions to the petitions are substantially the same, except for the additional financial question raised by Lakewood. Mis-

[5] The petition, filed before KOA-AM's increased news coverage, refers only to KGMC's proposals.

sion contends the format change is based on informed and reasoned programming and business judgment of an experienced broadcaster. It points to KBTR's experience with the "all news" format and the substantial sized news department needed for this operation. It notes that of the 12 "all news" stations in the country, nine are operated by major multiple owners such as CBS, Westinghouse, etc.; all but three are located in the top ten markets; and eight have a television affiliate in the same market. This establishes, Mission claims, that an "all news" format by an independent radio station is not economically viable in the absence of an enormous audience available in the top ten markets. Mission refers to the heavy promotion of KBTR over Mullins' television station and billboards, notwithstanding which KBTR lost over $500,000. Mission refers to the expanded news programming at KGMC, and the abundance of news available over 20 other radio stations and four television stations in the Denver area. It notes the Denver area has only one 24-hour country and western station and there is a demonstrated interest in country music programming which will be met by Mission. Based on the foregoing circumstances, it is Mission's judgment the public interest would best be served by the balanced format and operation it proposes. (Mission opposition, pp. 7 to 15).

14. Addressing itself to petitioners' arguments, Mission notes the format change will not deprive Denver listeners of news. The area's 20 radio and 4 television stations offer news day and night on the hour, the half hour and other times during hours. And additional "all news" blocks will be available from KGMC.[6] As to the quality of news, Mission contends petitioners exaggerate their case in extolling KBTR's service. The latest renewal applications show KLZ, AM, FM, and TV have a news staff of 30 persons; KOA, AM, FM, and TV report a news staff of 23; and KBTV a news staff of 30. Apart from this, Mission will bring to Denver a broadcast news service with proven award-winning credentials, and the station will subscribe to the UPI news wire service, the UPI audio network, the ESSA weather wire service, and will have audio communications facilities with local law enforcement agencies. Mission denies the allegation local origination of news will vanish, citing the great emphasis Mission puts on local news at its other stations. (Opposition to Citizens' petition, pp. 17 to 20).

15. Respecting the alleged inadequacies of ascertainment procedures, Mission states it did not interview community leaders concerning format preferences because the Primer makes it clear community leaders are to be interviewed in order to ascertain *problems* as distinguished from program preferences, and because the best index of program preferences in the Denver community consists of professional radio surveys. Mission also contends its five regularly scheduled local interview and documentary programs have the specific purpose of dealing with ascertained community problems irrespective of whether such problems are mentioned in terms. Mission maintains it will contribute to program diversity. Mission's country music format will bring the array of music services in the area more in line with prevailing tastes.

[6] And from KOA–AM whose format was changed several months after the opposition was filed.

Mission will devote 10% of its total broadcast time to news, and 60% of this will be devoted to local matters. Mission will further devote 2% of total broadcast time to public affairs and will bring to Denver an editorial voice which speaks frequently and on hard issues of the day. (Ibid., pp. 20 to 27).

16. Mission contends *Camden* and *Citizens Committee*, *supra*, are not in point. Unlike *Camden*, it notes, there is no question here but that Mission intends to serve the city of license, and with a format which, while not providing the same percentages of non-entertainment programs now carried by KBTR, is nevertheless a balanced format with substantial amounts of news and public affairs programs. As for *Citizens Committee*, KBTR is not the only station which provides news coverage, and area needs for news programs will be provided by Mission and other radio and television broadcasters. Moreover, the economic infeasibility of attempting to continue an "all news" format in a market of Denver's size on an independent basis has been demonstrated both on an industry basis and by KBTR's specific operating experience. (Ibid., pp. 27 to 30).

17. Finally, Mission contends its resources are adequate to establish financial qualification (opposition to Lakewood petition, pp. 23 to 24). And as for the request that we take notice of the KADX(FM) application, Mission notes the alleged contract is now in the courts and if Mission is awarded specific performance, an application will be filed containing the required information on Mission's ability to acquire KADX(FM).

18. Both petitioners take issue with Mission's oppositions and continue to press their claims in their replies. Additionally, petitioners dispute the claim an independent "all news" format is not economically viable in Denver, and Citizens (Reply, p. 10) suggest a group of Denver businessmen has indicated a willingness to purchase KBTR and preserve its format.

19. The central question here is whether petitioners have raised any "substantial and material questions of fact" which must be resolved in a hearing. See Sections 309(d) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d) and (e). That question must be resolved against a background of the Ascertainment Primer, relevant court decisions, and limitations on our authority under the existing system of broadcasting to dictate to applicants what formats they shall carry.

20. We begin with the allegations Mission's ascertainment procedures were defective. The fundamental error of petitioners lies in a persistent misreading of the purpose of ascertainment procedures. This misreading is compounded in Citizens' case by its reliance on the *1968* Public Notice on ascertainment procedures (see p. 14 of Citizens' petition) rather than on the 1971 Primer which now governs.[7] Prior to 1971, the purpose behind the need for ascertaining "community needs" (the language of the 1968 Public Notice) was commonly misunder-

[7] Although Citizens refers to the 1971 primer (see footnote 1, p. 14 of Citizens' petition), for some unexplained reason its arguments are framed in terms of the 1968 Notice. Citizen's reliance on the 1968 Notice leads it to complain (petition, pp. 17–18) that poverty and drug abuse can hardly be considered community "needs". The answer is they are not needs, but problems.

stood, with many applicants thinking ascertainment related to uncovering program and format preferences of interviewees, rather than community *problems*. In discussing this widespread misunderstanding in the Report and Order on the Primer revision, we pointed out that

> . . . our experience has shown that a large segment of the broadcast industry has steadfastly interpreted community "needs" to mean program preferences. We are shown, for example, communities with "needs" for more country and western music, or more sports programs, but which apparently are not believed to have needs for improved schools, roads, or welfare programs. Therefore, having failed, in large measure, in our earlier efforts to impress upon applicants that the phrase "community needs" encompasses a much larger area than program preferences, we sought in preparing the Primer to use a new word to emphasize our intent; hence, "problems". (Report and Order, Parag. 17, 36 Fed. Reg. 4092, at 4094).

This clarifying language was carried forward into the revised Primer, and expressly establishes that the purpose of interviewing community leaders is to discover community *problems*, *not* to elicit program preferences. See Questions 3 and 17 of the revised Primer, 36 Fed. Reg. at 4104 and 4105.

21. Mission's duty as a broadcast applicant was first to determine the composition of the community and area served by KBTR in order to know the significant groups therein (Questions 4, 9 and 10, Primer); and then to ascertain community problems (Question 3) by having management level officials consult with community leaders (Questions 4 and 11(a)) and by having principals or employees consult further with members of the general public (Questions 4 and 11(b)). Having ascertained community problems, Mission was required to evaluate the results of its consultations to determine relative importance of community problems and the extent to which it could present broadcast matter to meet such problems (Question 23). Mission, like all applicants, had broad discretion to determine what broadcast matter it would carry to meet community needs, because "broadcast matter" is defined to include programs and announcements (Question 28), station editorials (Question 32), and—in part—news programs (Question 33). Mission was further required to submit with the application a list identifying the community leaders it consulted (Question 20), and to list all community problems mentioned in such consultations (except "clearly frivolous" problems), irrespective of whether it proposed to meet all problems. (Question 22). Mission's evaluation of the consultations did *not* have to be included with the application (Question 24), but Mission was required to link ascertained problems it intended to meet to its proposed programs. (Question 29).

22. We have carefully considered the application (including especially Exhibit 12, which contains the ascertainment exhibits), and we conclude that Mission has complied with all requirements of the Primer. It has identified the composition of the Denver area served by KBTR, the required consultations with community leaders and members of the general public have been held in strict compliance with the

primer, the application contains the reports of such consultations (but not Mission's evaluation, since that is not required), eight significant community problems have been isolated,[8] and the program service formulated in response to ascertained problems is set out. Mission proposes to meet such problems through (1) local news service (including fair and equal coverage of news events dealing with minority groups, stock market news, hourly weather news, etc.), (2) five regular interview and documentary type programs daily,[9] (3) editorial comments on issues of local, national and international importance, and (4) Washington Reports by Colorado's senators and Denver area representatives.

23. Accordingly, we do not think the allegations pertaining to Mission's ascertainment procedures and proposed programming raise any substantial and material questions of fact which must be resolved in a hearing. Irrespective of whether all interviewees were informed of the proposed format change (and judging from Citizens' resurvey, some had been told, and others not), Mission did not mislead those interviewees because the Primer makes it crystal clear—as Mission correctly points out—that the purpose of consultations with community leaders is to ascertain community problems, not to elicit views on program or format preferences. See paragraph 20, *supra*. And since the Primer is not concerned with community leaders' views on program preferences, there is no basis for concluding Mission tried to mislead the Commission by not including interviewee comments on format choices in the consultation reports filed with the application. Given the Primer requirements, any factual questions raised by Mission's alleged failure to inform interviewees of the format change or to include their comments on such proposal are not substantial questions, and certainly not the *material* questions which are required before a hearing is needed. Of course, we recognize that when applicants propose to change formats, it can be argued it would be better if such proposals were mentioned to interviewees for comment, but such procedure is not presently required by the Primer.

24. The arguments based on *Camden* and *Citizens Committee*, *supra*, involve different considerations and need to be put into perspective. KBTR's format is unique only in the limited sense that KBTR is the only area station which broadcasts "all news" twenty-four hours a day. But KBTR is not the only source of radio news in Denver, a point which even petitioners concede. In fact, twenty other Denver-area radio stations provide a total of 291 hours and 39 minutes of radio news per week. See *Attachment D*. And as noted above, two Denver-area stations (one a clear channel station with ten times KBTR's power) have altered their formats to provide "all news" in prime listening hours and have increased their news staffs and newsgathering facilities. Moreover, radio news is available in the Denver area on a twenty-

[8] Drug abuse, poverty, human relations, metro government, mass transit, pollution control, education and police and public safety. (Exhibit 12, p. 8).

[9] *City with a Chance,* focusing on minority group needs and problems, *Core City Report*, focusing on inner-city concerns, *University Forum,* dealing with schools and campus problems, *Operation Input,* which will broadcast suggestions of members of the public on ways of solving problems and improving community life, and *KBTR Comments,* which will deal with current community problems not covered by the foregoing programs and which in political campaigns will be used for interviews of candidates for public office.

four hour basis, although on different frequencies. Under the facts presented, we do not believe the public interest would be served by compelling KBTR to retain its "all news" format. Unlike *Citizens Committee*, which involved a format change in the only classical music station in Atlanta, KBTR is not the sole source of a particular type of programming. And as we have recognized elsewhere, under our system of broadcasting, the public interest is best served by not hampering a licensee's flexibility in choosing or changing formats. See *WTOS–FM*, 21 RR2d 146, at 150 to 152.

25. Economic considerations have their bearing here, too. Mullins has lost over $500,000 under KBTR's present format, despite heavy promotion of the "all news" format by Mullins' other media in Denver. We cannot insist that Mullins sell only to someone who will continue "all news" service, and if an assignee (such as Mission) proposes an alternative service, the question is whether approval of his application will serve the public interest.[10] Here, Roth, on the basis of his broadcast experience and KBTR's record under an "all news" format has determined that an independent "all news" station in a market the size of Denver could at best be only a marginally successful operation. Petitioners argue KBTR's worst losses are behind it, the "all news" service has won advertiser acceptance, and KBTR's recent profits all suggest an "all news" format is economically viable in Denver, and that a hearing is needed to resolve this point. We disagree. KBTR's recent modest profits are in stark contrast to the overall loss exceeding $500,000, and even then were realized only under heavy promotion by Mullins other Denver media.

26. We conclude the plethora of news services available in Denver, the prime time "all news" services recently made available by Stations KGMC and KOA–AM, and the alternative balanced program format proposed by Mission all justify the format change at KBTR. In making this judgment, we do not pretend that every demonstrated listener need or interest in Denver will be perfectly met. But as suggested before, we cannot guarantee that every broadcast need will be instantly gratified on a fixed frequency, twenty-four hours per day. It is unreasonable to expect this, and the Communications Act neither requires nor authorizes such a result.

27. We consider finally Lakewood's claim that Mission is not financially qualified. No extended discussion is needed on this point because it is clear Mission's financial qualifications have been demonstrated. Its first year needs for the purchase and operation of KBTR are:

Purchase price	$1,500,000
Mission's share of filing and grant fees	15,500
Lease of premises occupied by KBTR	12,400
Repayment of principal on Mellon National Bank and Trust Co. loan	400,000
Interest on loan	152,000
Total	2,079,900

[10] On this point, the final sentence of Section 310(b) of the Communications Act prohibits consideration of other proposals (Citizens' reply, Exhibit E).

To meet first year needs, it has the following resources:

Loan from Mellon National Bank. Principal is repayable in 10 equal semi-annual installments. Interest will not exceed 2% above prevailing prime rate	$2,000,000
Excess of current assets ($729,668) over current liabilities ($537,601) as shown on consolidated balance sheet of Mission Broadcasting Co., July 31, 1971. Current assets include liquid assets (cash on hand and cash surrender value of life insurance) of $209,537	192,087
Projection of 1970 KBTR operating profit, based on that shown in affidivit of Mullins' secretary-treasurer, in Mission's opposition to Lakewood petition	46,435
Total	2,224,705

28. We have officially noted Mission's petition to deny the KADX (FM) assignment (BALH–1644). Any liability Mission will incur under that assignment is contingent on the suppositious eventuality that Mission succeeds in establishing the validity of its contract to acquire KADX(FM). In the event Mission succeeds, its ability to acquire KADX(FM) has to take into account obligations incurred under the present contract.

29. Accordingly, IT IS ORDERED, That, the application for the assignment of the license of Station KBTR, Denver, Colorado from Charles A. Haskell, Max G. Brooks and Alvin G. Flanagan, co-executors of the Estate of John C. Mullins (Deceased) to Mission Denver Company (BAL–7409), IS GRANTED.

30. IT IS FURTHER ORDERED, That, the Petition to Deny and to Intervene, filed by Colorado Citizens for Broadcasting *et al.*, IS DENIED; and that the Petition to Deny, filed by Lakewood Broadcasting Service, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

ATTACHMENT "A"

MR. BEN F. WAPLE,
Secretary,
Federal Communications Commission,
Washington, D.C. 20554

DEAR SIR: This is to provide a report on a proposed change in the program operation in Radio Station KGMC, Englewood, Colorado.

As was indicated in our renewal application filed Dec. 31, 1970, KGMC is the exclusive "Talk" station in the Englewood-Littleton-Denver area. In a typical week of operation during the current license term, we are devoting the following amounts of program time (not including commercial matter) to News, Public Affairs and All Other Programs exclusive of Entertainment and Sports:

Class of program	Hours: minutes	Percentage
News	11:36	13.2
Public affairs	49:24	56.2
All other programs exclusive of entertainment and sports	1:00	1.1

In the application that has recently been filed with the Commission requesting approval of assignment of the Denver area's "All News" radio station, KBTR, from Mullins Broadcasting Co. to Mission Denver Co., it is indicated that the prospective purchaser of the station does not propose to continue the "All News" format of the station. In light of this development, KGMC proposes to expand its news programming. KGMC currently offers 2 five minute newscasts hourly, local news on the hour and MBC network news on the half-hour. In its expanded news operation, KGMC proposes to provide "Continuous News" during prime listening periods of 6 a.m. to 9 a.m., 11:30 a.m. to 1:30 p.m. and 4 p.m. to 6 p.m. or a total of 7 hours daily. We will continue to offer 10 minutes of news in all other time periods.

The combination of Continuous News and Talk have been successful in other markets, attracting good audiences and avoiding the repetition of around the clock All News. It is a natural development for KGMC, which has offered All-Talk for nearly 2 years, which already has a significant news operation, and whose President is a newsman of some 30 years experience as a reporter, editor and broadcaster.

We estimate that during a typical week under the modified format described herein, the following program time will be devoted to the categories of interest to the Commission:

Class of program	Hours: minutes	Percentage
News	38:16	43.57
Public affairs	22:44	25.83
All other programs exclusive of entertainment and sports	1:00	1.1

Yours Very Truly,

ROBERT B. MCWILLIAMS,
President. MacLee Radio, Inc. Licensee.
/s/ Robert B. McWilliams

ATTACHMENT "B"

File No. BR 2687
MARCH 11, 1972.

MR. BEN F. WAPLE,
Secretary, The Federal Communications Commission,
Washington, D.C. 20554

DEAR SIR: This is to advise the commission of the implementation of proposed changes in the program operation of Radio Station KGMC, Englewood, Colo., which were proposed in our letter to the commission of October 14, 1971.

We have gone to CONTINUOUS NEWS from 6 a.m. to 9 a.m. and from 4 to 6 p.m. weekdays, and from 6 to 9 on Saturday mornings. In addition we have installed comprehensive 15 minute news roundups in the noon hours of 12, 1 and 2 p.m. weekdays. These are in addition to our regularly scheduled 5 minutes of news on the hour and 5 minutes of news on the half hour in all our other program, which continues to be TALK.

As outlined to the commission in our previous letter, this heavy schedule of CONTINUOUS NEWS is to provide to the public of our listening area CONTINUOUS NEWS programming which will be missing when KBTR, the current All News station, is transferred to another owner, as is now before the commission.

KGMC Radio has added substantially to its local news staff for this expanded news operation. In the near future, we expect to fill in the remaining small segments in the 2 hour noonday All News programming, as originally proposed in our Oct. 14 letter.

The combination of CONTINUOUS NEWS in drive periods along with TALK in other periods has attracted substantial audiences in other major markets—we believe that KGMC Radio will be offering an outstanding combination of public service unequalled in our listening territory.

In our new news operation, KGMC is going far beyond the reach of any news radio operation heretofore available in Denver. Not only are we staffing to cover the "hard" news of violence, accidents, fires, crime, but we are offering news and background reports in the areas of social problems, minority grievances, the youth problems, the drug problem, etc. This is being done in documentary and news form. In addition we are continuing to air significant speeches and addresses from all elements of the Denver Metro community, and from Englewood.

Yours very truly,

ROBERT B. MCWILLIAMS,
President, MacLee Radio, Inc. (KGMC).

ATTACHMENT "C"

MARCH 31, 1972.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554

GENTLEMEN: On Monday, March 6, 1972 the format of station KOA–AM was adjusted. A description of the changes follows:

KOA–AM will program 'news blocks' from 6:30 A.M. to 8:30 A.M.; from 12:00 Noon to 1:00 P.M., and from 4:30 P.M. to 6:15 P.M., Monday through Friday. Regular participants in each 'news block' include an anchorman/host and personnel from the KOA News, Weather, Sports, Farm and Community Affairs Departments. Because of the expanded news and information programming, additional newsmen have been hired and a substantial investment has been made in acquiring news-gathering equipment and studio facilities.

From 8:30 A.M. to 12:00 Noon and from 1:00 P.M. to 4:30 P.M., KOA–AM will program 'adult-contemporary' music. News will be programmed on the hour and half-hour during these periods. The remainder of the KOA–AM schedule remains basically unchanged. KOA–FM remains unchanged.

A comparison of the percentages resulting from the expanded news and information programming with the proposed programming percentages from our current application are as follows:

	Format effective Mar. 6, 1972	Current (pending) format
News	34 hours, 17 minutes 21.0 percent	27 hours, 42 minutes 17.0 percent.
Public affair	17 hours, 5 minutes 10.4 percent	17 hours, 12 minutes 10.6 percent.
All other	17 hours, 2 minutes 10.4 percent	17 hours, 6 minutes 10.5 percent.

Our News percentages have increased almost 23% with this programming adjustment.

Cordially,

MICK SCHAFBUCH,
Vice President and General Manager KOA–AM & FM.

ATTACHMENT "D"

Radio News In The Denver Area Aside From Station KBTR

Station	News	Total time per week
KADX-FM	3-5 minutes, 15 past the hour, 24 hours, 7 days	11 hours, 12 minutes.
KBOL	three 15 minute reports, 3 minute reports, daily	1 hour, 0 minutes.
KBPI-FM	8-10 minutes, every hour on the hour, 24 hours, 7 days	22 hours, 24 minutes.
KBRN	5 min on the hour, 15 min three times a day, sunrise to sunset	10 hours, 30 minutes.
KDEN-AM	5 min, every hour on the hour, 24 hours, 7 days	14 hours, 0 minutes.
KFML-AM/FM	not regularly scheduled, minimum of 80 minutes per day	14 hours, 0 minutes.
KFSC-AM	5 minutes every half hour 7 days, sunrise-sunset	14 hours, 0 minutes.
KGMC	5 min, on the hour and 5 min on the half-hour, sunrise-sunset, 7 days	14 hours, 0 minutes.
KHOW-AM/FM	10 min, every hour on the hour, 24 hours, 7 days	28 hours, 0 minutes.
KIMN	5 min, five times a day, 10 min, six times a day, 7 days	9 hours, 45 minutes.
KJAE(FM)	8-10 min on the hour, 24 hours, 7 days	22 hours, 24 minutes.
KLAK	5 min on the hour, 24 hours, 7 days	14 hours, 0 minutes.
KLIR-AM	5 min, 7 times a day, 7 days	4 hours, 5 minutes.
KLIR-FM	1 min, every hour on the hour, 24 hours, 7 days	2 hours, 48 minutes.
KLZ-AM/FM	5 min, once every hour 24 hours, 7 days	14 hours, 0 minutes.
KOA	15 min at 6 a.m., 7 a.m., 8 a.m., 12 noon, 4 p.m., 5 min 11 times a day on the hour, 5 min. on the half-hour 24 hours, 7 days.	30 hours, 55 minutes
KOSI	5 min, on the half hour and on the hour, 24 hours, 7 days	24 hours, 0 minutes.
KQXI	8 min. once each every in the afternoon	5 hours, 36 minutes.
KTLK	5 min on the hour, 24 hours, 7 days	14 hours, 0 minutes.
KVOD	5 min twice per hour, 18 hours per day	21 hours, 10 minutes.
Total		291 hours, 39 minutes.

Television News In The Denver Area

KBTV(TV)	Monday-Friday:	
	12:00-12:30	30 minutes.
	5:00-5:30 net	30 minutes.
	5:30-6:00 local	30 minutes.
	10:00-11:00	1 hour.
	Weekends:	
	Saturday early and late (30 each)	1 hour.
	Sunday 15 mins net, Saturday 15 mins net	30 minutes.
	Total	14 hours per week.
KOA-TV	Monday-Friday:	
	Today Show	30 minutes.
	10:55	5 minutes.
	Noon	30 minutes.
	5:00-6:00 local/net	1 hour.
	10:00-10:30	30 minutes.
	Weekends:	
	Saturday 4:30	30 minutes.
	Saturday 10:00	30 minutes.
	Saturday 1:00 AM	5 minutes.
	Sunday 10:00	30 minutes.
	Total	14 hours 30 mins/week.

Television News In The Denver Area—Continued

Station	News	Total time per week
KLZ-TV	Monday-Friday:	
	6:30 AM	5 minutes.
	6:55 AM	5 minutes.
	11:00 AM	30 minutes.
	5:00-6:00 local	1 hour.
	6:00-6:30 net	30 minutes.
	10:00-10:30	30 minutes.
	Weekends:	
	Saturday 10:00	30 minutes.
	Saturday 4:30	30 minutes.
	Saturday 5:00	30 minutes.
	Sunday 5:00	30 minutes.
	Saturday 10:00	30 minutes.
	Total	15 hours 50 mins/week
KWGN-TV	Monday-Friday:	
	9:00-10:00 PM	1 hour.
	late news at 1:00	15 minutes.
	Weekends:	
	Saturday 9:00	30 minutes.
	Sunday 9:00	30 minutes.
	Saturday 1:00 AM	5 minutes.
	Sunday 1:00 AM	5 minutes.
	Total	7 hours 25 mins/week

F.C.C. 72-702

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
JERSEY CAPE BROADCASTING CORP.

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released July 27, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it the "Petition for Reconsideration" filed on August 18, 1971, by George F. Kugler, Jr., the Attorney General of New Jersey, in behalf of the New Jersey State Lottery Commission, and that of Joseph J. Maraziti, State Senator of Morris County, New Jersey, and Carl E. Erickson, Alderman of Dover, New Jersey, filed jointly on August 20, 1971.[1] Also before us for consideration is additional material consisting of a supporting brief and a request for oral argument furnished by the New Jersey State Lottery Commission on October 6, 1971, to supplement the information contained in the original petition.[2]

2. Petitioners are requesting the Commission to reconsider the declaratory ruling, released on July 20, 1971, 30 FCC 2d 794, in the Matter of Jersey Cape Broadcasting Corporation, in which we indicated that the proposed broadcasts of the winning number in the New Jersey State Lottery would violate 18 U.S.C. § 1304 and the Commission's regulations which prohibit the broadcasting of ". . . any advertisement of or information concerning any lottery . . ."[3] In order to clarify this ruling, the Commission released a subsequent Public Notice on July 27, 1971 (36 Fed. Reg. 14347 (1971)) which stated, among other things, that the winning number may not be broadcast as part of a news item.

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[1] The joint petition also appended copies of several letters urging review from New Jersey members of the U.S. Senate and House of Representatives.

[2] The Commission has received several letters in this matter and all of these have been taken into consideration in our action here.

[3] 18 U.S.C. § 1304 reads as follows:

Broadcasting lottery information.

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes shall be fined not more than $1,000 or imprisoned not more than one year or both. Each day's broadcasting shall constitute a separate offense.

The applicable Commission rules (Section 73.122(AM), 73.292(FM) and 73.656(TV)) essentially repeat the statute. They were recited in our previous ruling and need not be reiterated.

3. The ruling petitioners seek to reverse was given in response to the request of Jersey Cape Broadcasting Corporation (hereinafter Jersey Cape), licensee of stations WCMC–AM–FM–TV, Wildwood, New Jersey, for a ruling that broadcasting of the winning state lottery number would not violate Section 1304 and the Commission's rules. Jersey Cape has not petitioned for reconsideration and the petitioners were not parties to the original request. However, it is clear from the matters stated in their respective petitions for reconsideration that they had no opportunity to intervene and that they are sufficiently aggrieved and adversely affected by the ruling, within the meaning of Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.106(b) of the Commission's rules, 47 CFR 1.106(b).

4. Jersey Cape's request proposed the following announcement for broadcast: "The winning state lottery number drawn today is (and then recite the winning number)." No further comment was to accompany the statement. The broadcasts were to take place on the day of the drawing and during three consecutive regular newscasts to commence at 12:00 noon shortly after the winning number had been drawn. The Commission recognized that the information to be broadcast had "some limited news value." Nevertheless, we decided that broadcasting it would violate the Federal lottery statute and the Commission's rules because to do so would directly promote a lottery. The decision was based primarily upon the guidance provided in the Commission's *Supplemental Declaratory Ruling* released March 2, 1970, 21 FCC 2d 846.

5. In the pleadings presently before us, the petitioner (New Jersey State Lottery Commission) makes basically the same argument as Jersey Cape made initially to the Commission, i.e., that the proposed broadcasts are legitimate news items concerning a lottery that only incidentally promote the lottery, and that therefore they are not prohibited by the Federal lottery statute and the Commission's rules. Petitioner (New Jersey State Lottery Commission) relies upon the same authorities cited in the Commission's ruling but comes to a different result in applying them to the proposed broadcasts. The other petitioners (State Senator Maraziti and Alderman Erickson) principally contend that the proposed announcements "cannot be categorized" as information promoting a lottery. They are treated separately in this opinion since they present different reasons to support their position.

6. *The New Jersey State Lottery Commission:* Petitioner is the executive agency established by the New Jersey Legislature to administer the State Lottery Law. In seeking reconsideration, petitioner argues (as Jersey Cape did) that the "prime effect" of broadcasting the winning lottery number is to inform the public of a bona fide news item in which they are greatly interested, and that only incidentally is there any promotion of the lottery. Like Jersey Cape, petitioner contends that the case of *New York State Broadcasters Association, Inc.* v. *United States of America*, 414 F. 2d 990 (2nd Cir. 1969), *cert. den.* 396 U.S. 1061 (1970) supports its position inasmuch as the case holds that 18 U.S.C. § 1304 prohibits only program materials which "directly promote a lottery" while permitting the broadcast of a bona

fide news story even though such news may have an "incidental effect" of promoting a lottery.

7. In addition, petitioner cites in its behalf certain language contained in the *Supplemental Declaratory Ruling*, *infra*, p. 847, stating that the Federal statute "would appear not to bar news reports broadcast in normal good faith coverage which are reasonably related to the audience's right and desire to be informed of the day-to-day happenings within the community." [4] Petitioner points out further that under Item 1 of the same ruling the Commission has authorized ". . . legitimate news stories appropriate to broadcasting," and has given as the reason for barring other news articles the fact that ". . . such time consuming listings are not ordinary broadcast journalism" (p. 848).[5]

8. Petitioner provides us with considerably more factual documentation than Jersey Cape did about the operation and importance of the State lottery, and contends that the various precedents permitting broadcasting of bona fide news items about lotteries should be examined against this factual background.[6] Petitioner then makes the following points: No plea to buy tickets or other promotional information concerning the lottery would be included in the announcements of the winning number. The announcements would not be comparable to the promotional material prepared by the advertising agency. They would be "news" and the stations would simply be reporting what the wire services had decided was newsworthy. The public demands this information and thus it is to be regarded as "news reports broadcast in normal good faith coverage which are reasonably related to the audience's right and desire to be informed of the day-to-day happenings within the community." The wire services do not report specific promotional material prepared by the advertising agency and thus ". . . there could hardly be a better practical determinant of 'normal good faith coverage' of news than the contents of a wire service teletype, for the wire services report 'news' and not 'direct and exhortative' promotional material." The announcements "would be entirely appropriate to ordinary broadcast journalism," and they would be even less "time consuming" than broadcasting information on the time, weather, traffic, stocks and sports.

9. Moreover, petitioner indicates that the broadcast of the winning number should be considered in connection with the Commission's standards for determining a "bona fide news-type program" contained

[4] Petitioner acknowledges that this language appeared initially in the September 25, 1968 declaratory ruling concerning the New York State Lottery, 14 FCC 2d 707, which was set aside by the Court in the *New York State* case. Petitioner states, however, that we have never repudiated this general construction of the statute.

[5] Petitioner also notes that under Item 3 of the *Supplemental Declaratory Ruling* an exception has been made for an explanation about how profits from the lottery will be distributed if the announcement is "part of the licensee's good faith effort to inform the public" and is not accompanied by other news directly promoting the lottery.

[6] For example, petitioner indicates that it has retained a professional advertising and public relations firm (Bofinger-Kaplan) to handle practically all direct promotional activities of the lottery, and states: "It would be fair to conclude, therefore, that all information which may validly be categorized as promotional is necessarily attributable to Bofinger-Kaplan, whereas all information which may validly be categorized as news may be attributable to other sources as well as to Bofinger-Kaplan." With this in mind, petitioner insists it is very significant that the announcement of the winning number is not supplied to the communications media by the advertising agency. Petitioner notes that the independent wire services obtain the number by telephoning the Lottery Commission and that Jersey Cape obtained the information from a news service teletype prepared by the wire services.

in FCC 70–871, "Use of Broadcast Facilities by Candidates for Public Office," 35 Fed. Reg. 13048 (1970).

10. Petitioner submits that the Commission has made an "unfortunate assumption" in stating that the proposed announcements would be of interest to a "limited class of people" and therefore that they would be of "limited news value." Petitioner contends the broadcast of the winning number is of "significant news value" and that the statistical documentation showing the large numbers of interested people participating in the lottery should provide us with an adequate ground for reconsideration. Petitioner also stresses the impossibility of its contacting the winner [7] and notes that publicizing the winning number is a "mechanical task" not requiring the assistance of its advertising firm. In view of this, petitioner submits the following proposition:

> In other words, promotion is the publicizing of that information which the Lottery Commission wants to convey in order to raise revenue by selling tickets, and news is the dissemination of that information which the public demands to know.

11. Lastly, petitioner contends that a "news" item may not be banned because the Commission considers it "reasonably necessary or helpful to the conduct of the lottery" (30 FCC 2d 795). Petitioner submits that under such a test, we should bar information giving the World Series, Super Bowl and horse racing results, since broadcasting this information is also "reasonably necessary or helpful" to the conduct of certain lotteries.

12. It is clear from the foregoing that petitioner is taking essentially the same position as Jersey Cape did although considerably more factual evidence and legal arguments have been presented. However, we do not believe that petitioner has correctly interpreted the precedents in this area, and as we have stated, at 30 FCC 2d 795, in the ruling which is the subject of petitioner's request here:

> * * * The *New York State* case does not, in our view, support Jersey Cape's position. While the Court recognized, at 414 F.2d 998, the distinction between information directly promoting a lottery (prohibited by 18 U.S.C. § 1304) and information which is simply "news" of a lottery (not prohibited), it did not define "direct promotion of a lottery." Accordingly, for specific guidance to broadcasters, it remanded the case to the Commission to apply its expertise to the problem.

We adhere to our view that the question here can be adequately answered from the guidance provided by the Commission in the *Supplemental Declaratory Ruling*. That ruling specifically indicates that the Commission regards such items as "[a]nnouncements (unpaid) of the places where lottery tickets may be purchased, where, how, and when winning tickets will be drawn, the amount of prizes, and how the proceeds of the sales of lottery tickets are and will be distributed" as items having only limited news value that directly promote a lottery. We continue to believe that the broadcast of the winning number in the State lottery is in this same category.[8]

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[7] Until the purchaser files a claim based on his ticket number, the Lottery Commission is not able to determine the winner. It keeps no records of names and addresses of lottery ticket purchasers.

[8] In the *New York State* case at page 998, the Court expressly recognized that a "news" item having only an "incidental effect of promoting a lottery" is permissible. On the other hand, the Court cautioned that a lottery advertisement or announcement containing "'news' such as the amount a lottery realized for education . . . would nonetheless be banned."

13. We are not persuaded by petitioner's reasoning, based upon the specific situation in New Jersey, as to why the broadcast of the winning number should fall within the explanation of permissible broadcasting of bona fide news concerning lotteries described in the *New York State* case and in the *Supplemental Declaratory Ruling*. Even assuming that petitioner is correct in attributing most direct promotional activities to its advertising agency, we do not think it necessarily follows that information received by a broadcaster from an independent source, such as the wire services, is therefore to be regarded as a legitimate news story appropriate for broadcasting within the meaning of Items 1 and 3 of the *Supplemental Declaratory Ruling*.[9] Nor does the fact that the wire service treat the information as newsworthy automatically make it "news" for purposes of the lottery statute. The public demand may be "truly staggering" but it cannot change the law to permit the broadcast of information directly promoting a lottery. We would point out that the length of a news item is not the only factor the Commission considers in deciding whether a news item is "ordinary broadcast journalism" and that brevity alone is not enough to authorize an announcement giving information about a lottery. Moreover, weather reports, stock reports and the like are permissible not because of their short duration but because there is no Federal policy or statute designed to inhibit their broadcast by denying access to facilities over which the Federal Government has control.

14. Further, the Commission's standards contained in FCC 70–871, "Use of Broadcast Facilities by Candidates for Public Office," *supra*, are concerned with the "equal opportunities" doctrine relating to the use of broadcasting facilities by legally qualified candidates for public office and have no bearing on determining whether a piece of information is a bona fide news item outside the prohibitions of the lottery law and regulations.

15. We also believe petitioner's arguments indicate some misunderstanding of the Commission's statement in *Jersey Cape* in which it was said that the proposed broadcasts do "not concern announcements of persons who have won" but instead would be devoted to "publicizing" the "winning number," and that the "widespread dissemination of such information" is "reasonably necessary or helpful to the conduct of the lottery and of interest only to that limited class of people who actually hold tickets." That language was intended to give the reasons why we think the proposed broadcasts would violate the basic prohibition of the statute against the broadcast of material which directly promotes a lottery. The purpose of explaining that the broadcast of the winning number would not present information about the persons who have won was to distinguish this kind of limited news item from items of general interest such as human interest stories about the winners which are expressly permitted under Item 6 of the *Supplemental Declaratory*

[9] Petitioner does not assert that the advertising agency never engages in news dissemination activities. However, its brief states that "[n]either petitioner nor Bofinger-Kaplan issues news releases of any kind to broadcasting media."

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Ruling.[10] The reference to a "limited class of people who actually hold tickets" was meant to emphasize that even information of some news value to some persons is prohibited if its broadcast would directly promote a lottery.[11] We think petitioner's admission that it needs to announce the winning number over the air because it does not have the information necessary to determine the identity of the winner merely serves to reinforce the finding that the broadcasts of the winning number would directly promote the lottery, or as we said in *Jersey Cape*, that the "widespread dissemination" of this information is "reasonably necessary or helpful to the conduct of the lottery." As for petitioner's suggestion that we should not permit the broadcast of the results of the World Series, Super Bowl, or horse races because information about them is "reasonably necessary or helpful to the conduct of the lottery," it is apparent that these are independent sporting events of legitimate interest to the viewing public and that such broadcasts are not being utilized as a means of publicizing the names of prize winners.

16. Petitioner also seeks an opportunity for oral argument before the Commission. However, in considering this request we have determined that the facts and the law are clear. The Court has decided in the *New York State* case that the lottery prohibitions are applicable to a legal state-operated lottery. Regardless of the public demand for this information and regardless of the need for wider publication of the winning lottery number, the Commission cannot relax the prohibitions of the Federal statute. The issue is for Congress not the Commission to resolve and we believe no useful purpose would be served by scheduling oral argument.

17. Joseph J. Maraziti and Carl E. Erickson: In their joint petition, they contend that announcing a winning lottery number is not comparable to prohibited announcements (unpaid) regarding locations where lottery tickets will be sold, the conditions under which the drawing will take place, the amounts of prizes, and how the proceeds of the lottery will be distributed. They base their argument upon the theory that 18 U.S.C. § 1304 prohibits the broadcasting of future events about a lottery that can be said to promote a lottery. They point out that announcing the winning number concerns a past event and that no one hearing such an announcement would be encouraged "to run out and buy a ticket or increase his normal purchase by hearing this report." They also maintain that announcing the winning number is indistinguishable from the broadcast of "top prize winners" which they say is recognized in our ruling as protected by the First Amendment. As a specific example of a permissible announcement they give the follow-

[10] In that ruling, the Commission found permissible the broadcast of "Interviews with persons holding winning lottery tickets, relating, among other matters of general interest, to the number of tickets they purchased, their expectation of winning a prize, their reactions upon learning that they held winning tickets, and what they did or intend to do with the prize money." The Commission stated that "Such interviews are permissible as part of the licensee's good faith judgment as to information serving the interests of its area."

[11] In this connection, it is pertinent to note that the Court in the *New York State* case specifically rejected an argument that all advertisements concerning the State lottery may not be banned because they convey information on "matters of highest public interest and concern." The Court stated as follows: "To the extent that information of public interest and concern was to be conveyed, it was wholly incidental and subordinate to the promotion and thus properly prohibited." (P. 998).

ing and argue that if its broadcast is allowed, it is the same thing as an announcement that "the winning number was 123456":

> [T]he winning lottery ticket was drawn at the Cherry Hill Shopping Mall by Miss America, surrounded by the Governor and other State and Local officials. The top prize winner was John Doe.

They further note that broadcasting the winning number should not be regarded as a " 'scoop' which enhances interest in the lottery" because the lottery ticket distributors post it immediately after the drawing and the press reports the winner a few hours later.

18. We find no support for petitioners' construction of the lottery statute in the decisions of the courts interpreting the statute. We recognize that the statute is to be narrowly construed because of first amendment considerations; however, the only judicial opinion specifically interpreting the "information concerning" language of the statute is the *New York State* case wherein the Court held that the test for determining whether material is prohibited by the statute is whether it "directly promotes a particular existing lottery," *supra*, p. 997. It should also be noted that the statute itself expressly prohibits a "list of the prizes drawn or awarded" which is, of course, information concerning a past event.

19. In addition, we think petitioners are incorrect in assuming that their example of a news item would be suitable for broadcast. As pointed out previously in this opinion, news matters of general interest about the winners would not violate the statute. However, the example given would not appear to contain information of the type described under Item 6 of the *Supplemental Declaratory Ruling*. (See paragraph 15 and footnote 10, *supra*.) As for petitioners' argument that the proposed broadcasts of the winning number would not encourage participants to do anything more to improve their chances of winning, we submit that petitioners have overlooked the stimulation such announcements would have in arousing and maintaining interest in the lottery as well as the importance to the Lottery Commission of communicating this information in order to assure the participants that they will not lose out on the big prize because of inadequate notification procedures.

20. We recognize the anomalous situation where the several states have enacted state lottery legislation and in accordance therewith are operating constitutional State lotteries and, in an effort to bring the lottery to the attention of their citizens, desire to utilize the broadcast media. We also note that this situation has been recognized by the Congress in its consideration of pending legislation concerning this subject. Nonetheless, until the present lottery statute is amended or qualified in any way, the Commission has no alternative but to apply the requirements of that statute.[12]

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[12] The lottery prohibition is a criminal statute in Title 18 of the U.S. Code and, as the Supreme Court held in *Federal Communications Commission* v. *American Broadcasting Company, Inc.*, 347 U.S. 284 (1954), the authority of the Commission with respect to its application is concurrent with that of the Department of Justice. In view of this, Commission action in this area is coordinated with the Department of Justice, and this procedure has been followed with respect to this proceeding.

21. Accordingly, IT IS ORDERED, that the request for oral argument filed by the New Jersey State Lottery Commission, IS DENIED.

IT IS FURTHER ORDERED, THAT the petitions for reconsideration filed by the New Jersey State Lottery Commission and by State Senator Joseph J. Maraziti and by Alderman Carl E. Erickson, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-660

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LEFLORE BROADCASTING CO., INC., LICENSEE OF STATION WSWG(AM), GREENWOOD, MISS.
Requests for Commission Action

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 25, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT; COMMISSIONER HOOKS ABSTAINING FROM VOTING.

1. Now under consideration are: (a) a petition filed April 8, 1971, by various individuals and an organization [1] residing or located in the area of Greenwood, Mississippi, concerning the operation of Station WSWG(AM), Greenwood, Mississippi, which is licensed to Leflore Broadcasting Company, Inc. (Leflore); (b) Leflore's opposition to the petition, filed May 7, 1971; (c) related pleadings [2]; and (d) our field investigation into the operation of Station WSWG. The petition seeks an order requiring Leflore to show cause why it should not cease and desist from broadcasting with its present format ("middle-of-the-road" music) or, alternatively, why its license should not be revoked. The petition also requests Leflore be ordered to cease and desist from violating Section 73.125 of our Rules, pertaining to equal employment opportunity. Finally, the petition requests that we make available the current financial reports (FCC Form 324) of all Greenwood stations.

2. The following information will aid in understanding the present proceeding. Greenwood has a population of 22,400, of which 49.68 percent are Black. Greenwood is located in Leflore County, which has a population of 42,111. The county population is 57.88 percent Black.[3] There are four radio stations licensed to Greenwood; WSWG, WSWG–FM, WGRM and WABG.[4] WSWG and WSWG–FM are

[1] The petitioners are: Johnny W. Williams, Theodore Hill, Jr., and George Davis, former employees of Station WSWG(AM); W. S. Lee, Jr., pastor of a predominantly Black church in Greenwood; Martha Cooley, a Black business woman; Jake McGhee; and the Greenwood Movement, a coalition of civil rights organizations in Greenwood.

[2] The related pleadings are: (a) a reply, filed July 6, 1971, by the petitioners; (b) a response to that reply, filed August 5, 1971, by Leflore; and (c) a reply to that response, filed October 20, 1971, by the petitioners. We have considered the petitioners' pleadings as an informal request for action filed pursuant to Section 1.41 of our Rules. As such, the filing periods applicable to formal petitions set out in Section 1.45 of our Rules are inapplicable here. Accordingly, we deny Leflore's request that we dismiss certain of the petitioners' pleadings because they were not seasonably filed.

[3] Population figures from the 1970 Census.

[4] WSWG (1kW–D) is licensed to Leflore Broadcasting Company, Inc. WSMG–FM (100 kW, 220 feet) is licensed to Dixie Broadcasting Company, Inc. WABG (500 W, 1 kW–LS, DA–N, U) is licensed to Greenwood Broadcasting Company, Inc. WGRM (250 W, 1 kW–LS, U) is licensed to Fayette C. Ewing. At the time this proceeding began, WSWG had the call sign of WLEF.

licensed to separate corporate entities, but the two corporations are commonly owned and controlled.[5]

3. Leflore acquired Station WSWG on August 14, 1969 (BAL–6619). In the assignment application, Leflore stated:

> We have found a tremendous need for a means of the Negro community expressing themselves (sic). The Negro organizations such as Elks Lodge, Negro P.T.A., Negro Schools, and Civic organizations have little or no way to publicize their events, unless they pay for them. Their (sic) is no local Negro sports coverage. The Negro youths of Greenwood are given no opportunity to learn or display their talents publicly unless it is at a school function. Their (sic) is no broadcast in the Greenwood market by Negro leaders as to how the 67% population might improve their standing in the community.

Various specific programs were proposed to meet those needs. The entertainment format was to be ". . . primarily Negro, contemporary, and Rhythm and Blues." In its 1970 renewal application, Leflore stated that it was the only station programmed for the Black majority and proposed to continue that orientation. Its past and proposed entertainment format was described as 95 percent rhythm and blues, 3 percent popular and 2 percent religious. The renewal application was granted on July 14, 1970 for a term ending June 1, 1973.

4. By letter dated March 17, 1971, Leflore advised us that effective March 8, 1971, it had changed its format to country and western music. The stated reason for the change was that Leflore had lost more than $20,000 during 1970. It believed that the new format was required to permit economic survival. It further believed that the country and western format would be well received and, presumably, relieve its economic difficulties. The following excerpts from Leflore's letter are relevant here:

> It should be observed that (WSWG's) policy with respect to public affairs, news, and other public interest programs to meet the needs and problems of the community remains unchanged. In fact, as a result of recent consultations with black leaders, it has been decided to add a "Black Forum" program at least once a month to focus upon the particular needs of the black community.
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> * * * * * * *
>
> (WSWG) wants to stress the fact that it will continue to serve the black community with its non-entertainment programming, and in fact plans to increase its service in that regard (e.g., "Black Forum").

The change in format was accompanied by the firing of two part-time Black announcers. A full time Black announcer was also fired and given severence pay. He was apparently rehired about two weeks later to work part time on Sunday mornings until May 3, 1970, when he went back to full time work at WSWG–FM. Petitions objecting to the firings and to the changed format were circulated and signed by Greenwood residents and sent to us. We also received individual letters of complaint.

5. The country and western format was short lived because, according to Leflore, sales remained low. On May 3, 1971, Stations WSWG and WSWG–FM began duplicating their programming during the daytime hours when WSWG was on the air. The "middle-of-the-road"

[5] Both corporations have the following officers and shareholders: C. D. Saunders, President and 75 per cent shareholder; James A. McCullough, Vice-President and 25 per cent shareholder; and Vera A. Ables, Secretary and Treasurer.

format of WSWG–FM was adopted for both stations. The broadcast day of the FM station was extended from 18 to 24 hours. The additional six hours accommodate a six-hour program with a rhythm and blues format hosted by the rehired Black announcer. This program is heard daily from 11:00 p.m. to 5:00 a.m.

6. The petitioners urge that Leflore should be required to return to its former rhythm and blues format on the AM station. They point to Leflore's showing in the assignment application that programs and music directed to the area Blacks were those most frequently mentioned in a survey. The petitioners argue that no subsequent showing has been made to establish that the preference for Black-oriented programming has changed to "middle-of-the-road" preferences. The petitioners assert that by changing the format to "middle of the road," Leflore is not operating substantially as set forth in its latest renewal application.

7. We have never required that format selection be governed by the results of a survey. In fact, the Primer on the ascertainment of community problems is not meant "to elicit program suggestions." See answer 18 of the Primer, 27 FCC 2d 650, 685 (1971). While we have held licensees to their representations as to commercial content and the percentages of the broadcast week devoted to specified kinds of non-entertainment programming, *KORD, Inc.*, 31 FCC 85 (1961), we have not held licensees to representations as to program format, on the grounds that this choice is largely within the discretion of the licensee, particularly in the face of a deteriorating financial condition, such as asserted by the licensee here. We have not, therefore, listed the change in format as one of the questions we have concerning Station WSWG's performance.

8. The petitioners urge that the Annual Financial Reports (Form 324) for all Greenwood broadcast stations should be made available to them so that they can independently review Leflore's claims of financial hardship. Since Leflore gave as a reason for the format change its poor financial position, and since this is in the nature of a contested proceeding, we believe, in the circumstances presented, that Leflore's recent Form 324's should be made available to the petitioners. Upon a review of that material, they can file any comments that they may deem appropriate. Furthermore, we agree with the petitioners that, in view of the shared facilities and the identity of ownership of Stations WSWG and WSWG–FM, it is necessary to release the Form 324's for both stations so that the allocation of costs between the two stations can be evaluated. However, we do not believe that the petitioners have shown that the Form 324's for the other Greenwood broadcast stations are necessary for the petitioner's evaluation. Therefore, we shall make only the Form 324's available to the petitioners for Stations WSWG and WSWG–FM. We believe that the years 1970 and 1971 are pertinent to Leflore's decision and the Form 324's for both years will be made available.

9. The petitioners have also requested that Leflore be ordered to reinstate Hill and Davis with back pay. At this point, we have made no determination on the allegation that the licensee practiced employment discrimination. In any event, unlike some other Federal agencies, we lack a specific grant of statutory authority for the re-

quested remedy, and we have adopted no rules to that effect. Thus, we believe that it is appropriate to indicate at this point that reinstatement with back pay is not a remedy that we shall apply.

10. We believe that the petitioners have raised substantial and material questions of fact as to whether Leflore's operation of Station WSWG is consonant with the public interest. Based on the information now before us, we believe that a hearing may be necessary to resolve those questions. The petitioners have requested the institution of a revocation or cease and desist hearing pursuant to Section 312 of the Communications Act. However, in light of the nature of the issues and the present posture of Leflore (i.e., in the last year of its license term, so that in any event no revocation proceeding could be concluded prior to the filing of a renewal), we believe it more appropriate to consider the issues in the context of a renewal proceeding. We further believe that in the circumstances the public interest would be served by prompt institution of that hearing rather than delaying the hearing until the end of the regular license term, which would be June 1, 1973. Accordingly, in the circumstances presented in this case, we believe that the public interest would be served by requiring Leflore to submit a renewal application for Station WSWG by November 1, 1972.

11. The questions we have at this point, based on all the information before us, are as follows:

(a) Whether the licensee has carried out in good faith the representations made in its renewal application as to proposed non-entertainment programming, particularly with respect to the programming directed toward meeting the problems and needs of the Black community;

(b) Whether in light of the licensee's performance in carrying out its representations in its renewal application and subsequent written statements to the Commission, the licensee made misrepresentations to the Commission in the application or those statements; and

(c) Whether the licensee has violated Section 73.125 of our Rules.

12. In view of the above, IT IS ORDERED, That Leflore Broadcasting Company, Inc., SHALL FILE A RENEWAL APPLICATION for Station WSWG no later than November 1, 1972.

13. IT IS FURTHER ORDERED, That the composite week to be used in the filing of the renewal application shall be as follows:

Sunday	Sept. 20, 1970
Monday	June 21, 1971
Tuesday	Feb. 9, 1971
Wednesday	Apr. 19, 1971
Thursday	Jan. 7, 1971
Friday	Apr. 23, 1971
Saturday	Oct. 17, 1970

14. IT IS FURTHER ORDERED, That the Chief of the Broadcast Bureau shall make available to the petitioners herein copies of the Form 324's filed in 1970 and 1971 for Stations WSWG and WSWG–FM.

15. IT IS FURTHER ORDERED, That the petition, to the extent that it requsts the institution of a proceeding pursuant to Section 312 of the Communications Act, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*

F.C.C. 72-631

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of LELAND BISBEE BROADCASTING CO. (ASSIGNOR) AND ARIZONA LOTUS CORP. (ASSIGNEE) For Assignment of Licenses of Station KRUX, Glendale, Ariz. and Station KTKT, Tucson, Ariz.	File No. BAL-7300

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 25, 1972)

BY THE COMMISSION: COMMISSIONER HOOKS NOT PARTICIPATING.

1. We have before us for consideration: (a) An application for voluntary assignment of the licenses of Stations KRUX, Glendale, Arizona and KTKT, Tucson, Arizona, from Leland Bisbee Broadcasting Company to Arizona Lotus Corporation; (b) A late filed pleading called "Petition to Deny Transfer" filed by Phil Richardson; (c) Opposition to Petition to Deny filed by Leland Bisbee Broadcasting Company; (d) Answer to Leland Bisbee Broadcasting Company-Opposition to Petition to Deny filed by Phil Richardson; (e) Petition to Dismiss filed by Arizona Lotus Corporation and (f) Response to Petition to Dismiss filed by Phil Richardson.[1]

2. The aforementioned application was filed on April 27, 1971 and was accepted for filing on May 19, 1971. Thus, under Section 1.580(i) of the Commission's Rules June 18, 1971 was the deadline for filing any Petitions to Deny the above application. Although the Petitioner through his attorney addressed a letter to the Commission on March 11, 1971 which stated that Phil Richardson "is entitled to 5% ownership" of the licensee, "and it hereby requested that the transfer of ownership not be approved until the matter of ownership has been determined", Phil Richardson did not file a "Petition to Deny" the application until September 17, 1971, some 90 days after the due date for Petitions to Deny. The pleading denominated "Petition to Deny Transfer" is untimely and under our rules cannot be considered as a Petition to Deny. However, in accord with our practice and the staff's letter of March 29, 1971, the Petition will be considered as an

[1] Subsequent to the filing of these pleadings Richardson addressed three letters of complaint to the Commission, alleging generally that the licensee had falsified program logs, had conducted a contest with a prearranged outcome and had given free time to certain local political figures. This resulted in a "hold" being placed on the assignment application. The Complaints and Compliance Division found the complaints to be old and unproven and, finding no reason to hold up the assignment further, cleared the file on May 11, 1972.

informal complaint under Section 1.587 of our Rules. We will treat all opposition pleadings including the Petition to Dismiss as responses to the informal complaint.

3. In his initial pleading complainant Richardson raised two questions: 1) That he has an "agreement" to acquire 5% of the stock of Leland Bisbee Broadcasting Company and that until this dispute "has been resolved, the Transfer should be denied". 2) That there has been a failure to disclose the true consideration of the sale's price and that the true consideration is $1,360,000.

4. The licensee points out with regard to complainant's first allegation that the pending application calls for a sale of assets rather than stock and that Richardson's remedy for enforcement of his alleged stock option lies with the local courts, not with the FCC. We agree. In fact, in his Petition to Deny the complainant pointed out that he will file a lawsuit. If he is successful, the grant of this application will not be a bar to his obtaining a 5% interest in Leland Bisbee Broadcasting. With regard to Richardson's contention that the true consideration for the above transaction is $1,360,000, the licensee points out there was full disclosure and considering the lease payments for the real property, the consideration as disclosed is $1,360,000. We agree that there has been full disclosure of the consideration involved.

5. Finally, Richardson alleges: "Assignee has intruded into the affairs of a broadcast property prior to FCC approval. On or about March 4, 1971 Howard Kalmenson (Principal in the Assignee), in the presence of Victor and Robert Arida, his accountants, made direct offers concerning salary and other inducement to Richardson, in an effort to dissuade him from taking the course Richardson followed the same date. In fact, it was Kalmenson who first apprised Richardson of terms of the February Purchase Agreement concealed from him by assignor." In our view, even assuming the truth of the alleged statement, standing alone it is not an indication of a premature transfer of control of the licensee, in violation of Section 310(b) of the Communications Act. Even if true, offers of employment are frequently made prior to Commission approval of a transaction. It is the transfer of control without prior Commission approval which is violative of the law. There is no indication of a transfer of control here. Therefore, we find no merit in this contention.

6. KRUX and KTKT have been commonly owned and operated by the assignor for a period of approximately 12 years. It was recently disclosed that there exists during daytime a slight overlap of the KRUX and KTKT measured 1 mv/m contours affecting an area of 120 square miles with a population of 1,207. On February 11, 1972, the assignor filed an application for construction permit (BP–19246) proposing a minor change in the KTKT daytime directional pattern to eliminate completely the small area of overlap with KRUX. This application was granted by the Commission on June 30, 1972. The assignee has stated that it will accept a grant of the assignment application subject to the condition that it modify the KTKT directional array as authorized in BP–19246, immediately after consummation of the assignment. In view of this representation, the assignment application will be granted subject to the condition that the assignee complete

the modification of the KTKT daytime directional pattern as authorized in BP–19246, within 60 days of the consummation of the assignment.

7. We have carefully examined the complaint and papers before us and find that there are no substantial and material questions of fact that remain unresolved. We find that the assignee is fully qualified and that a grant of the application will serve the public interest, convenience and necessity.

In view of the above, the pleading entitled "Petition to Deny Transfer" is DISMISSED and the application to assign the licenses of Stations KRUX and KTKT (BAL–7300), from Leland Bisbee Broadcasting Company to Arizona Lotus Corporation is GRANTED, subject to the condition that the assignee complete the modification of the KTKT daytime directional pattern as authorized in BP–19246, within 60 days of the consummation of the assignment.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-663

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969	Docket No. 19555

NOTICE OF PROPOSED RULEMAKING

(Adopted July 24, 1972; Released August 1, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOOKS ABSENT.

1. Our purpose herein is to implement the National Environmental Policy Act of 1969, 42 U.S.C.A. 4321–4347, and particularly Section 102(2)(c) of the Act, 42 U.S.C.A. 4332(2)(c).[1] The proposed rules are set out as an Appendix hereto.

2. In drafting the rules, careful consideration has been given to Guidelines issued by the Council on Environmental Quality. In its regulatory activities, the Commission approves or disapproves of applications which may involve construction projects by others which may have a significant effect on the quality of the human environment, but does not itself engage in construction activities. In processing the hundreds of thousands of applications which are filed during a given year, it is almost totally dependent on information furnished by the applicant and others. Whether the criterion is efficiency, practicality or fairness, it is preferable to have all of the information and arguments from all interested persons before a judgment is made. This is particularly true of many environmental considerations, which have only recently been introduced as factors in the decision-making process. Thus, we propose (where there appears to be significant environmental effect) to transmit the application and related papers (including an environmental report prepared by the applicant) to the expert agencies, and to elicit environmental comments from those agencies and the public on the basis of those materials. A detailed environmental statement would be prepared following submission of agency and public comment. This seems to us the best way to assure full and fair consideration of the question of environmental impact.

[1] Heretofore, the Commission has considered environmental factors on a case-by-case basis, pursuant to an initial policy judgment that this was the better and more appropriate means of implementing the statute, in view of the relatively limited environmental impact of Commission actions. Though we have not decided many cases in which environmental questions were at issue, such questions have been considered when they were present. See, e.g., *Amendment of FM Table of Assignments*, 25 F.C.C. 877 (1970). In the light of recent court decisions, however, we have reassessed our initial position and are now persuaded that it is advisable and desirable to issue specific implementing regulations.

3. Our purpose has been to fully implement both the letter and spirit of the environmental statute, consistent with procedural safeguards set out in the Administrative Procedure Act and the Communications Act, and with no greater application processing burden or delay than is necessary. The rules provide for the regular input of environmental data which will facilitate the identification and consideration of environmentally significant factors. They provide for comment by interested individuals and organizations and by expert governmental agencies, and for their participation in Commission proceeding. They provide for the consideration of environmental factors at the same time and in the same way as other factors pertinent to a public interest determination are considered, except that they provide for the preparation of a "detailed environmental statement" following comment by interested persons and expert agencies and prior to action, as required by the environmental act.

4. The rules apply to applications involving construction. Attention is directed to the fact that the Commission has not for some years required applicants for authorizations in the Safety and Special Radio Services to file an application for authority to construct prior to construction of station facilities. See Section 319(d) of the Communications Act, 47 U.S.C. 319(d). In those services, therefore, the proposed rules are made applicable to applicants and applications for station authorizations rather than applicants and applications for authority to construct. For the most part, it is anticipated that the approximately 550,000 Safety and Special applications filed annually would involve minor construction having no significant environmental effect. However, Safety and Special applicants should consider environmental factors prior to construction, since construction without prior consideration of the environmental consequences and Commission authorization would prove fruitless if the Commission should subsequently find it necessary to deny the application for license on environmental grounds.

5. Authority for the proposed rules is contained in Sections 4(i), 4(j), 303(r) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r) and 309, and in the National Environmental Policy Act, 42 U.S.C.A. 4321–4347.

6. Pursuant to applicable procedures set out in Section 1.415 of the Rules and Regulations, 47 CFR 1.415, interested persons may file comments in this proceeding on or before September 29, 1972, and reply comments on or before October 30, 1972. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 CFR 1.419, an original and 14 copies of all comments and reply comments shall be furnished the Commission. Comments and reply comments will be available for inspection in the Commission's Broadcast and Dockets Reference Room. All relevant and timely comments and reply comments will be considered by the Commission prior to final action in this proceeding. In reaching its decision, the Commission may take into account other relevant information before it in addition to the specific comments invited by this Notice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended by adding a new Subpart I, to read as follows:

Subpart I—Procedures Implementing the National Environmental Policy Act of 1969.

§ 1.1301 *Basis and Purpose.*

The provisions of this subpart implement the National Environmental Policy Act of 1969, 42 U.S.C.A. 4321–4347.

§ 1.1303 *Scope.*

The provisions of this subpart apply to all applications filed with the Commission involving the construction, abandonment, or razing of a structure. They also apply to applications for license for new or modified facilities in the Safety and Special Radio Services. The term "application (or applicant) for authority to construct," as used in this subpart, shall encompass the abandonment or razing of a structure and an application (or applicant) for license for new or modified facilities in the Safety and Special Radio Services.

§ 1.1311 *Notice of proposed construction.*

(a) An applicant for authority to construct is required to provide notice to appropriate persons or organizations if it appears to him, or to the Commission upon review of his application, that the proposed construction is likely to involve a significant environmental problem and that notice is likely to provoke comment which would be helpful in assessing the effect of the proposed construction on the quality of the human environment. The notice shall state the nature and location of the construction and shall invite comment to the applicant on environmental considerations.

(b) Where notice is required and written comment is requested, 30 days shall be allowed for comment. Comments received shall be considered by the applicant in assessing the effect of the proposed construction on the quality of the human environment pursuant to the provisions of §§ 1.1313–1.1317. In normal course, notice should be given, and procedures for the consideration of environmental effect should be completed, before the application is filed, and written comments pursuant to the notice should be submitted to the Commission with the application. However, the applicant may, upon a showing of good cause, defer notice until after the application is filed. In that event, the applicant shall state in his application that he is seeking comment on a deferred basis, and action on the application will be deferred until applicant has given notice and complied with the provisions of § 1.1313, § 1.1315 or § 1.1317, as appropriate.

(c) The form of the notice and the persons or organizations to whom it is given will vary depending on the nature and scope of the construction project. The environmental effect and the sources of useful comment could be strictly local or could extend to a number of States. In a given case, for example, it could be appropriate to post notice at the site, to discuss the matter orally with neighboring property owners, or to raise it at a meeting of a community group. In another, newspaper or broadcast station notice could be appropriate. In still another, it could be appropriate to contact State or Federal environmental organizations and Government agencies which may reasonably be considered to have an interest in the environmental effect of the project. The form and extent of notice is left to the judgment of the applicant, subject to review by the Commission.

§ 1.1313 *Applications entailing expenditures of less than $100,000.*

(a) If an application for authority to construct entails expenditures of less than $100,000, if the applicant has considered the matter and has concluded that the construction will have no significant environmental effect, and if the applicant has received no significant objection to the construction proposed in the application, he may, as an alternative to filing a preliminary or detailed environmental report (see §§ 1.1315 and 1.1317), submit with his application a simple statement to that effect: *Provided, however,* That this paragraph shall apply only where prior public notice of the filing of the application is given by the Commission. See 47 U.S.C. 309(b).

(b) The Commission may, upon review of an application filed in accordance with paragraph (a) of this section, require the submission of a preliminary or detailed environmental report.

§ 1.1315 *Applicant's preliminary (short form) environmental report.*

(a) Except as provided in this paragraph, all applicants seeking authority for construction (and all applicants seeking authority to discontinue, reduce, or impair service to a community, or part of a community, which involves the abandonment or razing of a structure owned or utilized by the applicant) shall file a preliminary environmental report. A preliminary environmental report need not be filed with the following applications unless the applicant has been required to provide notice of proposed construction under § 1.1311:

(1) Applications accompanied by the statement provided for in § 1.1313 or by the detailed environmental report provided for in § 1.1317.

(2) Applications for authority to mount an antenna on an existing antenna tower, provided the height of the structure is increased by no more than 20 feet or by no more than 10%, whichever is greater.

(3) Applications for authority to construct an antenna structure which will extend no more than 20 feet above ground or natural formation or above an existing man-made structure.

(4) Applications proposing to locate antenna structures within an established antenna farm.

(5) Applications which involve the attachment of additional wire or cable to existing telephone poles and do not involve the erection of new poles.

(6) Applications involving the installation of additional cable in duct or conduit space over existing cable routes.

(7) Applications for authority to modify existing facilities where the modification will involve no significant construction external to an existing structure.

(8) Applications for authority to construct an antenna structure which is to remain in place for a temporary period (as for the conduct of experimental operations or during the continuance of emergency conditions) and then be removed, provided there will be no lasting effects of environmental significance.

(9) Applications for authority to construct a temporary structure on an existing antenna site to maintain service pending repair of the permanent structure.

(10) Applications for authority to replace an existing antenna structure with a new structure on the same site having essentially the same height and design.

(11) Applications for authority to construct facilities to be utilized exclusively in rendering services to the United States Government, where the existence or purpose of such facilities is classified security information. (In such cases, it would appear that the environmental determination should be made by the Government agency for which the services are to be rendered under procedures compatible with the national security and on the basis of information which that agency alone may have.)

(b) The purpose of the preliminary environmental report is to require the applicant, and to permit the Commission, to ascertain whether the construction proposed would involve a significant environmental problem. If the applicant concludes that the proposed construction will have a significant effect on the quality of the human environment, he should file a detailed, rather than a preliminary, environmental report. The preliminary report shall describe the construction site and the construction proposed, including Auxiliary construction such as access roads and powers lines. It may be set out as a narrative statement. The following questions are illustrative of those which should be answered in the report:

(1) *Harmony with man-made uses.* How far is the proposed construction from the nearest structures not owned or utilized by the applicant? What is the character of these structures (e.g., residential, business, industrial)? How is the area zoned? Was it necessary for the

applicant to obtain a zoning variance? State your conclusion as to whether the proposed construction is in harmony with or would disturb man-made uses of the surrounding area. If there are elements of disharmony or disturbance, state why they are not considered of environmental significance.

(2) *Harmony with natural uses.* Does the proposed construction intrude in any significant way upon wilderness areas, wildlife preserves, natural flyways for birds, or like areas? Would construction require the significant destruction of vegetation required as food or shelter by animal life native to the area? If there is some intrusion upon natural uses, state why it is not considered to be environmentally significant.

(3) *Harmony with environmentally valuable sites.* Is the proposed construction so situated as to detract in any significant respect from the value of any scenic, cultural, historic or recreational site? If there is some intrusion on such a site, state why it is not considered to be environmentally significant.

(4) *Substantial change in the character of land utilized.* Does the proposed construction effect any substantial change in the character of the land utilized (e.g., deforestation, water diversion, wetland fill, or other extensive change of surface features)? If there is some substantial change in the character of the land utilized, state the reasons for concluding that the change is not environmentally significant.

(5) *Comments and complaints.* What efforts (if any) have been made to elicit comment on the environmental effect of the proposed construction? Submit copies of any written comments or complaints received.

§ 1.1317 *Applicant's detailed environmental report.*

A detailed environmental report shall be filed if it is determined by the applicant or by the Commission that the proposed construction will have a significant effect on the quality of the human environment or if there is reason for substantial doubt as to the proper conclusion. The detailed report, like the preliminary report, shall describe the environmental impact of the proposed construction and shall, in addition, deal with such of the following matters as may be pertinent:

(a) *Any adverse environmental problems which cannot be avoided should the proposal be implemented.* (1) What steps have been taken or will be taken to reduce, minimize, or eliminate any adverse environmental impact? These could include reforestation, landscaping, architectural innovations, sewage treatment facilities or arrangements, fences to limit access to dangerous areas.

(2) Assuming such steps are taken, what significant environmental problems remain which cannot be avoided?

(3) Why can they not be avoided?

(b) *Alternatives to the proposed action.* (1) What alternatives have been considered which could reduce, minimize or eliminate any adverse environmental impact? These could include relocation of the construction site, location of an antenna or an existing structure rather than on a new tower, self-supporting rather than guyed antenna towers, and so forth. Where receiving equipment is subject to control by the applicant, consideration could also be given to use of higher capability receivers with a shorter transmitting antenna tower.

(2) What environmentally desirable alternatives exist that have not been adopted?

(3) Why have they not been adopted?

(c) *The cumulative long-term effect of the proposed construction, to the extent it differs from the immediate effect of the project considered in isolation.*

(d) *Any irreversible and irretrievable commitment of resources which would be involved in the proposed construction.* This provision relates to the depletion of limited natural resources, which is a factor we would not expect to be present in the construction of communications facilities, except possibly in limited respects (see, e.g., § 1.1315(b)(2) and (4)). Nevertheless, the environmental report should deal with this factor, should it be present.

§ 1.1321 *Commission consideration of environmental effect.*

(a) The Commission will consider the environmental effect of proposed construction in all instances in which a preliminary or detailed environmental report is required.

(b) If the request is not accompanied by a detailed environmental report, and if it is clear from the preliminary environmental report that the proposed construction will not have a significant effect on the quality of the human environment, the request will thereafter be processed without further consideration of environmental factors.

(c) In reviewing the preliminary environmental report, the Commission may require the submission of additional information or may direct the applicant to request (additional) comment and report the results to the Commission. Processing of the application will be deferred pending receipt of such additional information.

(d) If upon reviewing the preliminary environmental report the Commission concludes that the proposed construction will have a significant effect on the quality of the human environment, or if there is substantial doubt as to the proper conclusion, the Commission will direct the applicant to submit a detailed environmental report and will defer processing the application pending receipt of such report.

(e) In reviewing a detailed environmental report, the Commission may direct the applicant to consider additional measures or alternatives which could reduce, minimize or eliminate an environmental problem and which were not considered in the report. The Commission may direct that technical studies be made or that expert opinion be obtained regarding the effect of the proposed construction and regarding the environmental, communications and cost effects of additional measures or alternatives which could reduce, minimize, or eliminate an environmental problem.

(f) If a detailed environmental report is submitted with the application or subsequently filed pursuant to Commission direction, the Commission will publish in the Federal Register a public notice containing the following information:

(1) The nature and location of the construction proposed.

(2) Whether there has been opposition to the application on the basis of environmental considerations.

(3) A brief statement regarding the nature of any environmental problem dealt with in the detailed environmental report or raised in any opposition to the application.

(4) A statement that the application and the environmental report and any oppositions are available for inspection at the Commission and in the local community or, if construction is not localized, at other appropriate locations.

(5) A statement that comments or petitions to deny the application on the basis of environmental considerations may be filed within 30 days after publication.

(g) Action on the application will be deferred for 30 days following publication of the notice in the Federal Register. Comments or petitions to deny the application on the basis of environmental considerations shall be filed within this 30 day period. If a person who comments or petitions to deny is specially qualified in any way to comment on environmental considerations, a statement of his qualifications shall be set out in the petition. Comments and petitions to deny shall be served on the applicant. The petition to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that grant of the application would be prima facie inconsistent with the public interest. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

(h) Provisions for public notice and petitions to deny on the basis of environmental considerations shall apply whenever a detailed environmental report is filed, regardless of whether the request would have been subject to notice and petition to deny procedures on other grounds. However, provision for notice and petition to deny on the basis of environmental considerations shall not open the application to attack on other grounds. Where

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a public notice is required for environmental and other reasons, a single notice may be published.

(i) Where public notice is published in the Federal Register, copies of the application, the detailed environmental report, and all related materials will be forwarded to the Council on Environmental Quality, to other Federal agencies having jurisdiction or special expertise with respect to the environmental impact of the proposed construction, and to appropriate State and local agencies, with a request for comment on the environmental impact of the construction proposed. The applicant may be required to file such number of additional copies of the application and related papers as are required for this purpose. Thirty (30) days will be allowed for comment. The identity and qualifications of the person(s) who prepared the comments shall be specified therein. A copy of agency comments shall be served on the applicant by the commenting agency.

(j) The applicant may respond to petitions to deny and agency comments within 21 days after the time for filing such petitions and comments has expired. The response shall be served by the applicant on persons who filed petitions to deny and on agencies which filed comments. The response shall contain specific allegations of fact or denials thereof, which shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

(k) The application, the detailed environmental report, and all related papers, including agency comments, shall be routinely available for public inspection.

(l) The applicant shall maintain a copy of the application, the detailed environmental report and related papers in the local community and make them available for inspection upon request. If construction is not localized, these materials shall be made available for inspection at such location(s) as may be appropriate to provide reasonable access to persons affected by the proposed construction.

§ 1.1323 *Commission action following the submission of comment on environmental effect; detailed environmental statement.*

(a) Following completion of procedures designed to elicit information and comment regarding the environmental effect of the proposed construction, and upon consideration of all information submitted, the Commission will make a determination as to whether such construction will have a significant effect on the quality of the human environment.

(b) If it is determined that the construction will not have a significant effect on the environment, the application will thereafter be processed without further consideration of environmental factors.

(c) If it is determined that the construction will have a significant effect on the environment, the Commission will prepare a detailed environmental statement. The statement will indicate the nature, location, and environmental impact of the proposed construction and will deal with such of the following matters as may be pertinent:

(1) Measures which will or could be taken to reduce, minimize or eliminate any adverse environmental impact.

(2) Alternatives to the proposed construction which could reduce, minimize or eliminate any adverse environmental impact.

(3) The cumulative, long-term effect of the proposed construction, to the extent it differs from the immediate effect of the project considered in isolation.

(4) Any irreversible and irretrievable commitment of resources which would be involved in the proposed construction.

The detailed environmental report may be incorporated by the Commission into its detailed environmental statement. The statement, shall, in addition, however, take into consideration all matters of substance raised by persons or agencies objecting to the construction on the basis of environmental considerations and shall contain an independent statement of the Commission's conclusions.

(d) The detailed environmental statement will be associated with the application and will be routinely available for public inspection. Copies of

the statement will be forwarded to the Council on Environmental Quality and to individuals who filed petitions to deny and agencies which filed comments. Action will not be taken less than 30 days after issuance of the detailed statement.

(e) If on review of the detailed environmental statement the Commission finds that there is no substantial and material question of fact relating to environmental considerations and that the public interest will be served by granting the application, it will grant the application.

(f) If on review of the detailed environmental statement it appears that there is a substantial and material question of fact relating to environmental considerations or that the Commission is unable, on the basis of environmental considerations, to determine that a grant of the requested authorization will serve the public interest, convenience and necessity, it will designate the application for hearing on an environmental issue.

(g) If on review of the detailed environmental statement the Commission finds that there is no substantial and material question of fact relating to environmental considerations but that a hearing is required for other reasons, it will designate the application for hearing on non-environmental issues only.

(h) Regardless of the action taken, the Commission will issue a statement of the reasons for its action.

§ 1.1325 *Consideration of the detailed environmental statement during the hearing and decision-making process.*

(a) If a case is designated for hearing on an environmental issue, the detailed environmental statement will be attached to the designation order and will be considered in delineating the scope of the environmental issue.

(b) Copies of comments from Federal, State and local agencies will be associated with the record of the hearing proceeding, shall be admissible in evidence for the limited purpose of showing the views of those agencies, and may be used in cross-examining witnesses on the environmental issue.

(c) Agencies and individuals who comment on environmental effect may be invited to participate as parties to the proceeding and, if not named as parties, may petition to intervene. Agencies which comment may be asked by Commission counsel or others to furnish expert witnesses to testify on matters of environmental impact. Subpoenas for the appearance of such agency experts will be issued, if necessary, when their testimony is required to lay a foundation for the admission of agency comments in evidence to show the truth of facts and the validity of conclusions contained thereof.

(d) The burden of proceeding with the introduction of evidence on the environmental issue, as well as the burden of proof on that issue, shall be upon the applicant, except as otherwise provided in the designation order.

F.C.C. 72-654

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
ROY H. PARK BROADCASTING, INC.
For a Tax Certificate Pursuant to Section 1071 of the Internal Revenue Code, 26 U.S.C. 1071

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 27, 1972)

BY THE COMMISSION: COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. We have before us a petition for reconsideration, filed by Roy H. Park Broadcasting, Inc. (hereinafter referred to as Park Broadcasting), seeking reconsideration of our earlier denial of a tax certificate covering Park Broadcasting's sale of a 30% stock interest in the licensee of television station WECT, Wilmington, North Carolina.

2. Park Broadcasting is the licensee of Station WNCT-TV, Greenville, North Carolina, which it acquired in 1962 upon the merger of Carolina Broadcasting System into Park Broadcasting. Among the assets acquired in connection with the merger was a 30% stock interest in Atlantic Telecasting Corporation, the licensee of WECT, Wilmington, North Carolina. Wilmington and Greenville are approximately 95 airline miles apart. At that time, there was Grade B overlap between the stations, which was permissible under the multiple ownership rules then in effect. In 1964, the multiple ownership rules were amended to forbid Grade B overlap between commonly owned stations, but divestiture was not required. After the rules were amended, Atlantic Telecasting filed an application for improvement of WECT's facilities. Since the application involved a major change causing increased Grade B overlap, it was subject to the new standard. The application was granted in January, 1966 subject to the condition that construction could not commence until the Commission had been notified in writing that (a) neither Roy nor Dorothy Park, his wife, is or will be an officer, director, or part of the Atlantic Telecasting's management, and (b) that Park's rights are abrogated to vote his stock to appoint or require the election or appointment of any officer or director.

3. The Parks resisted the condition, principally on the ground Park Broadcasting considered it necessary to have representation on Atlantic Telecasting' s Board of Directors because of the substantial investment in Atlantic (which owned, in addition to WECT, 95.06% of South Carolina Bottling Company, which had Pepsi Cola bottling works in six cities). Both before the filing of the application to im-

prove WECT's facilities and after the conditional grant referred to above, various proposals were considered for preventing Park Broadcasting from voting its 30% interest in Atlantic Telecasting. These included a 1965 offer by the other Atlantic Telecasting owners to buy out that interest for $450,000 (a sum Park Broadcasting considered inadequate), a proposal to exchange the 30% interest for a controlling interest in the Pepsi Cola subsidiaries, and the filing of a transfer of control application (BTC–5398) which proposed to put Park Broadcasting's minority interest in a voting trust. Before BTC–5398 was acted on, the Commission proposed an alternative condition that Mr. and Mrs. Park not be officers of Atlantic Telecasting and that they "remove themselves from actions and considerations of the Board of Directors of Atlantic Telecasting Corporation with respect to the operation and control of Television Station WECT". On the advice of their North Carolina counsel, the Parks advised the Commission that directors cannot remain semi-active and avoid personal liability under North Carolina law, that the proposed trust arrangement (BTC–5398) effectively isolated the Parks from control of WECT, and that it was essential for the Parks to continue as directors in view of their substantial investment in WECT and the Pepsi Cola subsidiaries.

4. The Commission considered this unacceptable and in December 1967, it directed the preparation of a letter which, *inter alia*, would have conditioned the next renewal of Park Broadcasting's WNCT–TV license upon the Parks' resigning as directors of Atlantic Telecasting. A deferral of Commission action was requested and new negotiations between the Parks and other Atlantic Telecasting stockholders took place. On February 6, 1968, Park Broadcasting sold its 30% interest in Atlantic Telecasting for $1,200,000, and the agreement was consummated in March 1968, thus removing the impediment to improvement of WECT's facilities.

5. Park Broadcasting did not request a tax certificate contemporaneously with the sale of its interests. Indeed, the request for a certificate did not come until more than 2½ years later, in October 1970. That request appears to have been prompted by two factors occurring long after the 1968 sale of the 30% interest in the WECT licensee: (a) the release of our Public Notice of July 16, 1970 respecting the issuance of tax certificates pursuant to Section 1071 of the Internal Revenue Code when licensees holding broadcast interests inconsistent with the new policy established in the First Report and Order in Docket 18110 voluntarily dispose of any such interests in order to comply with that new policy (*Tax Certificates*, 19 RR 2d 1831), and (b) and our action, taken shortly after Public Notice of the new tax certificate policy, in making unconditional the tax certificate issued to Jefferson Standard Broadcasting Company in connection with its involuntary sale of WBTW, Florence, South Carolina (*Jefferson Standard Broadcasting Co.*, 19 RR 2d 1016).

6. In view of our decision on reconsideration, it is unnecessary to dwell at length on our earlier reasons for denying a tax certificate. (*Roy H. Park*, 29 FCC 2d 218). Suffice it to say that, essentially, we decided there that the necessary "causal relationship" between the sale of Park Broadcasting's minority interest in Atlantic Telecasting and the new

overlap rules adopted in 1964 was lacking, because Atlantic Telecasting was not forced to choose between improving facilities and Park Broadcasting's continued ownership of a minority interest.

7. Upon reconsideration, we are convinced Park Broadcasting's sale of its 30% interest was involuntary and was prompted by the practical need of the Parks (especially in view of the possibility the WNCT–TV license would be set for hearing at the next renewal if the Parks continued as directors of Atlantic Telecasting) to sever their relation with Atlantic Telecasting so that improvement of WECT could go forward. Viewed in this light, the transaction is governed by the ordinary "involuntary" test rather than the standards for voluntary divestitures which are designed to achieve compliance with the new policy enunciated in Docket 18110 (*Tax Certificates, supra*).[1]

8. Accordingly, a tax certificate will be issued, subject to certain limitations. Park Broadcasting represents that its 30% interest in Atlantic Telecasting was sold for $1,200,000, and apparently it requests a tax certificate for that amount. But neither the request for a certificate nor the petition for reconsideration takes into account the fact that apparently a very substantial portion of the consideration Park Broadcasting received represented the value properly allocable to Atlantic Telecasting's non-broadcast properties—the Pepsi Cola bottling subsidiaries. Throughout its pleadings, Park Broadcasting stresses that the Pepsi Cola subsidiaries constituted a substantial portion of Atlantic Telecasting's assets at the time the minority interest was sold. In fact, the statement of facts (p. 17) accompanying the request for a certificate appears to suggest the bottling subsidiaries may have been worth substantially more than the WECT assets, inasmuch as the Atlantic Telecasting stockholders considered inadequate a 1969 offer of $12.7 million for those subsidiaries.

9. Other requests for tax certificates have not involved a total consideration which is allocable between broadcast and non-broadcast properties. Section 1071 of the Internal Revenue Code is framed entirely in terms of divestiture of broadcast properties. In view of the express limits of Section 1071, we conclude we have no authority to certify that the portion of the consideration allocable to the Pepsi Cola subsidiaries is entitled to tax deferral treatment. The bottling subsidiaries were in no way related to the Grade B overlap problem, and the sale of any interest therein did not effectuate any change in Commission policy under the multiple ownership rules. Moreover, the Commission neither had—nor claimed—any authority over these non-broadcast assets in connection with the overlap problem. Accordingly, we hold that our certifying jurisdiction under Section 1071 is limited to divestitures involving broadcast stations and facilities and assets reasonably ancillary thereto. Our certificate will thus be limited to that portion of the consideration which the Internal Revenue Service determines is properly allocable to the broadcast assets involved in the sale of the Atlantic Telecasting stock. In our judgment, the allocation be-

[1] Obviously, Park Broadcasting's sale in no way furthered the new policy of Docket 18110. A certificate under the Public Notice of July 9, 1970 is justified only when a voluntary divestiture is causally related to, and effectuates, the new multiple ownership rules adopted in Docket 18110.

tween the values of the broadcast and non-broadcast properties should be left to the expertise of the Internal Revenue Service, which is in a better position to determine the proper tax and accounting procedures to be followed.

10. Accordingly, IT IS ORDERED, THAT a tax certificate respecting the sale by Roy H. Park Broadcasting, Inc., of its minority stock interest in Atlantic Telecasting Corporation, shall be issued, limited to that portion of the consideration which the Internal Revenue Service determines is properly allocable to the WECT assets (including facilities and assets reasonably related to WECT), as of March 5, 1968.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

I must dissent to the majority's action in reconsidering the Commission's earlier refusal to issue a Section 1071 tax certificate covering Roy H. Park Broadcasting's sale of a 30% stock interest in the licensee of television station WECT, Wilmington, North Carolina. See 29 FCC 2d 218 (1971). The issuance of the tax certificate comes over four years after consummation of the sale of Park Broadcasting's interest in Atlantic Telecasting Corporation of $1,200,000, and the majority's action effectively emasculates the standards previously established by the Commission for the issuance of tax certificates.

The circumstances are severely aggravated here by the fact that Park Broadcasting did not request a tax certificate at the time of the sale of its minority interest in Atlantic Telecasting in March of 1968. In fact, no request was made until October, 1970—some two and one-half years later. The 1970 request was apparently based on the liberalized tax certificate policy announced by the Commission on July 16, 1970,[1] and on the subsequent grant of an unconditional tax certificate in connection with the sale of television station WBTW, Florence, South Carolina. See *Jefferson Standard Broadcasting Co.*, FCC 70–877, 19 RR 2d 1016.

However, as we noted in our earlier denial of Park Broadcasting's request for a tax certificate, there was no causal relationship between the multiple ownership rules adopted in 1964 and the sale of Park Broadcasting's minority interest in the licensee of WECT in 1968 since the licensee was not forced to choose between the improvement of WECT's facilities [2] and Park Broadcasting's continued ownership in the station. In fact, the Commission had found that continued ownership by Park Broadcasting in WECT was consistent with the 1964 overlap rules and had proposed a condition on the grant of the station's modification application that would have disallowed the par-

[1] *Public Notice on Issuance of Tax Certificates*, FCC 70–774, 19 RR 2d 1831.

[2] In 1962, Park Broadcasting became the licensee of station WNCT–TV, Greenville, North Carolina, and the 30% owner of WECT. The existing overlap of the stations' Grade B contours was permissible under the rules then in effect. In 1964, the multiple ownership rules were amended to forbid Grade B overlap between commonly owned stations, but divestiture was not required. Thereafter, in 1965, WECT filed an application to improve its facilities, which had the effect of increasing the Grade B overlap and subjecting the major change to the new standard.

ticipation of Roy H. Park and his wife in the management and operation of station WECT, but would have permitted their continuation as directors of Atlantic Telecasting's bottling company subsidiary. The Commission explained that, based on its experience, such conditions were willingly accepted in the relatively few instances where grant of an application would otherwise contravene its overlap rules due to a common minority interest in two stations.[3] In its prior action, the Commission also distinguished the instant case from *Jefferson Standard*, where there was 100% joint ownership of two television stations and the licensee desired improvement of one station's facilities, which would cause overlap prohibited by the 1964 multiple ownership rules.

Nevertheless, the majority, on reconsideration, retreats from the Commission's prior reliance on the 1970 *Public Notice* and the standards to be applied to voluntary dispositions of broadcast interests. It even admits that the sale of Park Broadcasting's minority interest in WECT in no way furthered the new policy adopted in Docket No. 18110. Rather, the majority concludes, at this very late date and for the first time, that the sale of the minority interest was involuntary and was prompted by Park Broadcasting's need to sever its relationship with WECT in order to permit an improvement in the station's facilities. However, nothing short of extreme mental gymnastics is required to conclude that the 1968 sale was an "involuntary" one which would qualify for the issuance of a tax certificate. As already noted, divestiture of Park Broadcasting's minority interest in WECT was not required for improvement of the station's facilities, and, in fact, the Commission had found that Park Broadcasting's continued ownership, in spite of the Grade B overlap, was consistent with the multiple ownership rules. Only the personal desire of Roy H. Park and his wife to exercise direct control over the management and operation of the broadcast facility "forced" a disposition of the 30% interest in Atlantic Telecasting.

It is more than apparent, therefore, that the majority's action in issuing a tax certificate cannot be justified under either the traditional involuntary test or the liberalized standards for voluntary divestitures announced in the 1970 *Public Notice*. The Commission's recent actions in the area of tax certificates concern me for they seem to indicate an indiscriminate expansion of discretionary authority. Only recently, I had occasion to comment on a similar action by the majority in another case involving Roy H. Park.[4] In my own view, such a trend subverts the very purpose of our certifying jurisdiction under Section 1071 of the Internal Revenue Code, which should not be used to serve only private interests to the exclusion of Commission policies aimed at the diversification of media ownership.

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[3] Such a condition was also appropriate where, as here, a controlling shareholder in one station has a minority interest in the other station.

[4] See my statement concerning the issuance of a Section 1071 tax certificate to cover the assignment of licenses of Stations WSLS–AM and FM, Roanoke, Virginia, from Roy H. Park Broadcasting of Roanoke, Inc. to Bass Brothers Telecasters, Inc. (*Public Notice* of June 23, 1972, Report No. 10744).

F.C.C. 72-685

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
RCA GLOBAL COMMUNICATIONS, INC.
Revisions to Tariff F.C.C. No. 67 To Indicate That VF Leased Channels Between San Francisco, Calif. and Honolulu, Hawaii, May Be Used by the Customer for Voice-Only Communications and That Such Channels May Also Be Used for Foreign Exchange Service

MEMORANDUM OPINION AND ORDER

(Adopted July 26, 1972; Released July 27, 1972)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has before it (a) proposed revisions [1] to Tariff F.C.C. No. 67 filed by RCA Global Communications, Inc. (RCA) on June 9, 1972 to become effective July 27, 1972 [2] which provide that Voice Frequency (VF) channels offered for leased channel service between San Francisco, California and Honolulu, Hawaii may be used for voice-only communications and may also be used for foreign exchange service; (b) a Petition to Reject filed on June 27, 1972 by Hawaiian Telephone Co. (Hawaiian); (c) a Petition to Reject or Suspend filed by the American Telephone and Telegraph Co. (AT&T) on June 30, 1972; (d) a reply to these petitions filed by RCA on July 10, 1972; and (e) a response to the RCA reply filed by Hawaiian on July 14, 1972.

2. RCA was granted authority by the Telegraph Committee on June 8, 1972 (File No. T-C-2039) to acquire and operate, among others, 4 voice-only satellite circuits between San Francisco, California and Honolulu, Hawaii. The instant filing was made pursuant to this authority. An Application for Review by the Commission of this grant has been filed by Hawaiian. Reversal of the action of the Telegraph Committee in this matter would, of course, render this offering moot.

3. In support of their requests for rejection, AT&T and Hawaiian contend that RCA is not authorized to provide foreign exchange service between San Francisco and Honolulu, and cannot grant itself authorization by merely filing a tariff. They further contend that even

[1] Specifically 186th Revised Page 1, 20th Revised Page 4A, 10th Revised Page 4AA, and 26th Revised Page 11E.
[2] Originally scheduled to become effective July 13, 1972 but voluntarily extended by authority of Special Permission No. 6574 and 6579.

assuming, *arguendo*, that RCA has the authority to participate in an offer of foreign exchange service between San Francisco and Honolulu, its tariff filing shows on its face that it neither complies with Sections 61.131–61.135 of the Commission's Rules, nor, alternatively, is being filed pursuant to a Commission ordered interconnection under Section 201 (a) of the Communications Act. They also contend that even assuming that the RCA filing is otherwise in full compliance with the law and the regulations, it must be rejected for total failure to supply the substantiating data required by Section 61.38 of the Commission's Rules.

4. Foreign exchange service is generally acknowledged to be the interconnection of a dedicated line whereby the customer may have access to the switched telephone network of a carrier in an exchange foreign to his own. It is not a distinct service that requires a discrete authorization. The concept is encompassed in the preexisting authority of a carrier to provide leased private line service between two points. We read the RCA tariff language on this point, therefore, as being permissive rather than purporting to offer a specific service. If the customer wishes his private line interconnected to the message telephone system of a carrier, and the interconnection can be effected by connecting arrangements transacted by or on behalf of the customer with Hawaiian, use of the leased channel for this purpose would be permissible. Therefore, compliance with Sections 61.131–61.133, 61.135 of the Commission's Rules is not necessary in this instance.

5. We are also satisfied that RCA has complied with the requirements of the Commission's Rules and will deny the petitions of Hawaiian and AT&T.

Accordingly, the above-mentioned petitions of Hawaiian and AT&T are hereby DENIED and the above-referenced tariff revisions of RCA are allowed to become effective.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72–632

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
RKO GENERAL, INC.
For Declaratory Ruling Concerning Issuance of Tax Certificates

JULY 19, 1972.

MR. W. THEODORE PIERSON,
Pierson, Ball & Dowd,
1000 Ring Building,
Washington, D.C. 20036

DEAR MR. PIERSON: This refers to your letter of March 28, 1972, written on behalf of RKO General, Inc., requesting a declaratory ruling respecting issuance of tax certificates under Section 1071 of the Internal Revenue Code, 26 U.S.C. 1071.

RKO General (hereinafter referred to as RKO), is the licensee of AM–FM–TV combinations in Boston, Los Angeles, New York City, and Memphis. It is also the licensee of AM–FM combinations in San Francisco, and Washington/Bethesda. RKO's Board of Directors has adopted resolutions which look to a voluntary "corporate on-to-a-market plan", under which the diversification objectives expressed in the First Report and Order in Docket 18110, 22 FCC 2d 306, would be achieved to the maximum extent possible. This plan, it is said, can more prudently be achieved if capital gains taxes on any transactions can be avoided. This can now be done where dispersal of facilities is accomplished by tax free exchanges. However, you feel that a more flexible approach would be through successive sales of AM or FM stations, without incurring adverse tax consequences in any of the sales.

Your letter recognizes—and no further discussion is needed on this point—that the Commission will grant a tax certificate when a licensee voluntarily complies with the modified policy of Docket 18110 (i.e., separates ownership of VHF television and aural facilities in the same market.) See Tax Certificates, 19 RR 2d 1831 and the Commission's subsequent announcement in footnote 6 of the Memorandum Opinion and Order disposing of petitions for reconsideration in Docket 18110, 28 FCC 2d 662, at 671.

However, even though the "so-called one-to-a-market rules will thus apply only to combinations of VHF stations with aural stations in the same market" (footnote 6, 28 FCC 2d 671), you believe that the policy considerations which underlie the tax certificate policy should be extended to voluntary one-to-a-market plans, and that the Commission should issue a declaratory ruling "that tax certificates will be issued, not only upon separation of aural and television facilities,

but also upon disposing of any one of the commonly-held radio stations." Your letter advances various arguments in support of this position.

The requested declaratory ruling must be denied because the relief requested is outside the basic statutory provision which authorizes tax certificates. Section 1071 of the Internal Revenue Code, *supra* provides in pertinent part as follows:

> (a) Nonrecognition of gain or loss—if the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. (Emphasis added).

Apart from the brief period between issuance of the First Report and Order in Docket 18110 and the later decision on reconsideration thereof, there has been no change in, or adoption of a new policy, respecting the common ownership of co-located AM and FM stations. See in particular footnote 6 of the Memorandum Opinion and Order, quoted above. Thus, the basic authorizing language of Section 1071 never comes into play, and all the arguments as to why we should issue a declaratory ruling become irrelevant.

In view of the foregoing considerations, your request for a declaratory ruling is denied.

Commissioner Johnson concurring in the result; Commissioner Hooks not participating.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-649
79846

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Cease and Desist Order To Be Directed Against SEDONA-OAK CREEK TV CABLE CO., SEDONA AND OAK CREEK CANYON, ARIZ.	Docket No. 19553 SR-17111

ORDER TO SHOW CAUSE

(Adopted July 19, 1972; Released July 26, 1972)

BY THE COMMISSION: CHAIRMAN BURCH NOT PARTICIPATING; COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. Sedona-Oak Creek TV & Cable Co. operates cable systems at Sedona and Oak Creek Canyon, Arizona, which provide their subscribers with the following television signals: KTAR-TV (NBC), KOOL-TV (CBS), KPAZ-TV (Ind.), KPHO-TV (Ind.), KTVK (ABC), Phoenix, Arizona. These signals are all distant, but Station KOAI-TV (NBC), Phoenix, Arizona, places a predicted Grade A contour over Sedona and Oak Creek Canyon, Arizona. On January 11, 1971, Grand Canyon Television Co., Inc., licensee of Station KOAI-TV, Flagstaff, Arizona, filed a "Petition For Issuance Of Order To Show Cause" directed against Sedona-Oak Creek TV & Cable Co. for failure to provide carriage and program exclusivity as provided by Section 74.1103 of the Commission's Rules.[1] Sedona-Oak Creek TV & Cable Co. thereafter submitted an informal request for waiver of Section 74.1103. Sedona-Oak Creek's waiver request was denied by the Commission and the request for issuance of an Order to Show Cause was dismissed. *Sedona-Oak Creek TV & Cable Co.*, 34 FCC 2d 288.

2. On June 5, 1972, Grand Canyon Television Co., Inc., filed a "Petition For Issuance Of Order To Show Cause" in which it alleges that Sedona-Oak Creek is not providing program exclusivity as required by the cited Order. Sedona-Oak Creek has not responded to this petition. In these circumstances, we will issue the requested Order To Show Cause.

3. The public interest requires that the hearing process be conducted as expeditiously as possible. The Examiner is so directed and shall issue his initial decision as promptly as possible after the conclusion of the hearing.

[1] Section 74.1103 is now Section 76.91 of the Commission's Rules.

Accordingly, IT IS ORDERED, That pursuant to Sections 312(b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312(b) and (c) and 409(a), Sedona-Oak Creek TV Cable Co. IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Section 76.91 of the Commission's Rules and Regulations on its cable systems at Sedona and Oak Creek Canyon, Arizona.

IT IS FURTHER ORDERED, That Sedona-Oak Creek TV Cable Co. IS DIRECTED to appear and give evidence with respect to the matters described above at a hearing to be held at Washington, D.C., at a time and place and before an Examiner to be specified by subsequent order, unless the hearing is waived in which event a written statement may be submitted.

IT IS FURTHER ORDERED, That Grand Canyon Television Co., Inc., and Chief, Cable Television Bureau ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That the Examiner shall conduct the hearing expeditiously and issue an initial decision as promptly as possible in accordance with paragraph three above.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by certified mail to Sedona-Oak Creek TV Cable Co.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-635

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JESSE WILLARD SHIRLEY, FAYETTE, ALA. Requests: 98.1 MHz, No. 251; 100 kW (H V); 356 Feet For Construction Permit	File No. BPH-6672

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 25, 1972)

BY THE COMMISSION: COMMISSIONER HOOKS NOT PARTICIPATING.

1. The Commission has under consideration (a) the captioned application; (b) a petition to deny the application filed on behalf of Bankhead Broadcasting Company, Inc. (Bankhead), licensee of standard broadcast station WWWF, Fayette, Alabama;[1] (c) Bankhead's "Comments in Further Opposition"; (d) the applicant's "Reply to Comments in Further Opposition"; and (e) Bankhead's responsive pleading of April 25, 1972.

2. Bankhead's daytime-only standard broadcast station WWWF is the only commercial broadcast facility located in Fayette, Alabama. Mr. Shirley desires to establish the first commercial FM broadcast station in that city, which would provide a first local nighttime aural service. Bankhead claims that the grant of a construction permit for an additional station in Fayette would result in economic injury to it, thus giving it standing as a party in interest within the meaning of section 309(d) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 9 RR 2008 (1940). Mr. Shirley contends that Bankhead Broadcasting Company, Inc., lacks standing as a party in interest since it is not the licensee of station WWWF. The current licensee of station WWWF is, in fact, Bankhead Broadcasting-Fayette, Inc. In response to Mr. Shirley's contention, Bankhead Broadcasting-Fayette, Inc., explains that when the original petition to deny Mr. Shirley's application was filed, the licensee of station WWWF was Bankhead Broadcasting Company, Inc., but that on January 1, 1970, the license was assigned to Bankhead Broadcasting-Fayette, Inc. The stockholders and the percentage of ownership interest of each stockholder in the latter corporation remained the same as in the former corporation. Subsequently, in 1972, the percentages of ownership interests were slightly changed. In light of the foregoing,

[1] As noted in paragraph 2, the current licensee of station WWWF is Bankhead Broadcasting-Fayette, Inc. The term "Bankhead," as used in this Memorandum Opinion and Order, refers to both the former and current corporate names of the licensee of station WWWF.

it is clear that the licensee of station WWWF has remained essentially the same throughout the course of the pleadings filed against Mr. Shirley and we find that it has standing as a party in interest within the meaning of section 309(d) of the Communications Act of 1934.

3. In its initial pleading filed against Mr. Shirley's application on May 5, 1969, Bankhead requested that the Commission either deny the pending Shirley application or hold it in abeyance pending the conclusion of Rule Making 1368 in Docket No. 18476. That proceeding dealt with the question of whether channel 225, the Class C channel which was then allocated to Fayette, Alabama, and for which Mr. Shirley had applied, should be deleted so that multiple channel A assignments could be made to various communities in Alabama. Mr. Shirley's application was held in abeyance during the course of that proceeding. On June 21, 1971, the Commission issued its *Third Report and Order in Docket 18476*, 30 FCC 2d 186, which substituted channel 251 (a Class C channel) for channel 225 at Fayette, assigned Class A channels to several communities, and deleted channel 225 from Fayette. The *Third Report and Order* recognized that a site meeting the required mileage separations for channel 251 in the Fayette area "must be located at a distance from the Fayette reference point." It further noted that Mr. Shirley had found a site in a small triangular area southwest of the city and concluded that "the public interest, convenience and necessity will be best served by assigning channel 251 in place of 225 at Fayette." Subsequently, on October 5, 1971, Mr. Shirley amended his application to request channel 251, change the transmitter site to a small triangular area 12 miles southwest of Fayette, and increase the effective radiated power from the previously proposed 27.1 kW to 100 kW. A new financing plan and a new ascertainment of community problems and needs were also submitted.

4. Section 73.210 of the Commission's rules requires that the main studio of an FM station either be located in the city of license, or that good cause be shown for locating the main studio outside that community. As previously noted, no applicant for channel 251 in Fayette can place his transmitter site within the community of Fayette and meet our required mileage separation rules. Mr. Shirley plans to locate his studio at his transmitter site, 0.85 mile southwest of the town of Kennedy and 12 miles southwest of Fayette. The applicant points out that an excellent state highway links Fayette and Kennedy and that the driving time between the two communities is no more than 15 minutes. He also notes that a Class C channel was assigned to Fayette for the purpose of establishing FM service over a wide area and that the proposed site is readily accessible to residents of the proposed service area. Furthermore, the studio is not being placed in a larger community than the city of license, so that clearly no *de facto* reallocation of the station is involved. In view of these circumstances, we find that good cause has been shown for locating the proposed station's main studio outside the city limits of Fayette.

5. Section 73.315(a) of our rules requires FM broadcast stations to provide a 3.16 mv/m signal over the principal community to be served, while section 73.315(b) of our rules states that an FM broadcast station's transmitter site should be chosen so that the line-of-sight can

be obtained from the antenna over the principal city or cities to be served, and that in no event should there be a major obstruction in this path. In a staff letter to the applicant, dated December 8, 1971, it was indicated that on the 51-degree radial, the city of Fayette did not appear to be within the line-of-sight from the antenna center, which might result in shadowing and a signal below the required 3.16 mv/m level. The applicant's consulting engineer responded that the use of dual polarization and maximum power should provide a superior signal over the entire area. He further noted that it could be reasoned that the signal over Fayette could be higher than predicted just as easily as it could be reasoned that it may be lower than the predicted value, citing paragraph 83 of our *First Report and Order in Docket No. 14185*, 33 FCC 209, 23 RR 1801 (1962).

6. Engineering studies show that although the center of the city of Fayette lies approximately 12.5 miles from the transmitter site, that the predicted distance of the radial through Fayette to the predicted 3.16 mv/m contour is approximately 20 miles. Thus, it is clear that the 3.16 mv/m contour will completely encompass the city of Fayette. Several hills obstruct the line-of-sight into the city, the highest one being approximately 150 feet above the line-of-sight. It does not appear, however, that any of these hills constitute a "major obstruction" in violation of section 73.315(b) of our rules. Moreover, we have held that obtaining line-of-sight over the entire community of license is not an absolute requirement, *Rush County Broadcasting Company, Inc.*, 26 FCC 2d 480, 20 RR 2d 783 (1970). In *Rush County*, we recognized that ". . . minor deviations can be (and in past instances have been) tolerated." Additionally, in this case, the location of the transmitter is traceable to severe restrictions contained in our spacing rules. We conclude that Bankhead has not presented a *prima facie* case for denial of the application, which would warrant a hearing to determine whether the proposed operation complies with the coverage requirements of section 73.315(a) and (b) of the rules. Even assuming some shadowing effects from the hills in the transmission path, no facts have been presented to indicate that the community of Fayette will not receive a satisfactory signal from the proposed facility, or that the shadowing would be of such a nature as to justify the denial of the entire proposal. Inasmuch as the line-of-sight provision of section 73.315(b) is not an absolute requirement, a grant of the applicant's request for waiver of that section, under the circumstances presented here, is not necessary.

7. Bankhead further contends that the strong signal from the proposed 100 kw FM facility on channel 251 will overload the input stage of television receivers tuned to educational television station WBIQ, channel 10, Birmingham, Alabama, and will generate a second harmonic within the set. It alleges that this will interact with the chrominance subcarrier of channel 10 and fatally degrade the color and picture content within the geographic area where the channel 251 signal is substantially higher than the channel 10 signal level. Bankhead asserts that the implementation of FM service on channel 251 in Fayette is thus a self-defeating procedure because any increase in height necessary to overcome any shadowing problems will increase

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the interference to educational television station WBIQ. Thus, Bankhead concludes that the allocation of FM channel 251 to Fayette should be vacated. Recognizing the existence of various kinds of interference to television reception, we issued a Notice of Inquiry (Docket No. 19183) on March 31, 1971, soliciting data and recommendations with respect to the entire matter. Comments have been filed by interested parties, but no final conclusions have yet been reached. When an FM station causes television interference either through radiation or harmonics or other spurious emissions, we have consistently maintained that it is the responsibility of the FM licensee to add filters or make adjustments on the equipment to eliminate such radiation. If the interference is generated internally in the television receivers by over-loading from the strong FM signal, it is considered to be due to a lack of selectivity in the receiver, which is primarily a problem of receiver design, and not a responsibility of the FM licensee. In the event of this latter type of interference, the Commission has maintained that this problem should be resolved by remedial measures at the source of the problem—improved designs of television receivers—rather than by manipulation of frequency assignments to FM broadcast stations. See *Policy to Govern the Change of FM Channels to Avoid Interference to Television Reception*, 2 FCC 2d 462 (1966). In either case, the Commission expects the FM licensee to cooperate in the solution of any interference problems that might arise. Mr. Shirley has expressed his willingness to cooperate with TV receiver owners and servicemen to eliminate any interference caused by his transmitter, in the event it does occur, even to the extent of providing filters when necessary. It does not appear that any interference to the reception of WBIQ would present an insurmountable problem. In view of these circumstances, and the fact that the entire question of FM interference to TV reception is being considered in an appropriate proceeding, a hearing issue on this matter with respect to this individual applicant would not be appropriate.

8. In its petition to deny, Bankhead questioned whether Mr. Shirley's ascertainment of community problems and needs filed in April 1969 was valid in light of the fact that seven of the forty-six persons interviewed by Mr. Shirley stated to the general manager of Bankhead's station WWWF that they had been improperly quoted, while six persons stated that they had not been informed of the purpose of the interviews at the time they took place. Accordingly, Bankhead requested that an ascertainment of community needs issue be designated against the applicant, as well as an issue to determine whether the applicant is qualified to be a licensee. It is noted that neither of Bankhead's 1972 pleadings filed against Mr. Shirley's current application, which is substantially different from his original application of 1969, requests either of those issues. Mr. Shirley has conducted two extensive ascertainments of community problems, needs and interests since his initial effort, which was filed in April 1969. His amendment of September 1969, explained the procedures which he undertook to assure the accurate recording of the ideas expressed by those interviewed. It is apparent that Mr. Shirley has now fully complied with the standards set forth in the *Primer on Ascertainment of Commu-*

nity Problems by Broadcast Applicants, 27 FCC 2d 650 (1971). He has clearly indicated the efforts made to learn the problems and needs of the area to be served and has proposed adequate programming designed to be responsive to those problems and needs. The alleged inaccuracies contained in his ascertainment submitted in April 1969 appear to be the result of carelessness rather than any attempt on his part to deliberately misrepresent the facts or mislead the Commission. Furthermore, he delineated measures to assure that such inaccuracies would not occur again. In view of the foregoing, we find that Mr. Shirley has undertaken an adequate ascertainment of the problems and needs of Fayette and has proposed programming which appears to be responsive to those needs. Further, we find that no information has been presented with respect to certain interviews held which would require a hearing to determine whether he possesses the requisite qualifications to be a broadcast licensee.

9. An analysis of Mr. Shirley's cost figures shows that $68,708[2] will be required to construct and operate his proposed station for one year. To satisfy this requirement, he has established the availability of $75,500.[3] Bankhead has raised certain questions as to the adequacy and accuracy of certain aspects of the applicant's financing plan, but all of these questions have been satisfactorily answered by the applicant and are now moot. In its petition to deny, Bankhead questioned the basis of the estimated cost of equipment to be purchased from Gates Radio Company; the accuracy of the estimated operating expenses; the availability of loans from Rufus Clay, O. J. Berryhill, and the First National Bank of Fayette; whether the proposed staff was adequate to operate the station and to provide the proposed programming; and whether Messrs. Clay and Berryhill would have the power to exercise *de facto* control over Mr. Shirley in the operation of his proposed station since part of their loan agreements provided that they would each receive a certain percentage of the station's gross receipts. The applicant subsequently amended his application so that Rufus Clay, O. J. Berryhill, and The First National Bank are no longer relied on for loans. A new line of credit for a greater amount of equipment has been established with Gates Radio Company and the estimated operating expenses have been increased.

10. Bankhead's current objections to Mr. Shirley's financing plan present four questions; namely, whether the cost allocation for the proposed staff is adequate to allow the applicant to perform his proposed programming; whether the estimation of first-year operating costs includes sufficient provisions for recording equipment or remote broadcast equipment needed to broadcast the "live" programming proposed by the applicant; whether the Shirley family can support itself for at least one year while Mr. and Mrs. Shirley work without salaries; and whether the applicant must include both interest and

[2] The applicant's total first-year costs are itemized as follows: down payment on equipment, $6,425; principal payments on equipment, including interest, $14,033; land and building expenses, $4,000; loan curtailments, including interest, $9,870; miscellaneous expenses, $2,500, and working capital, $31,880.

[3] The applicant has shown the availability of personal loans of $40,000 and $25,000, as well as cash and liquid assets of $10,500.

partial repayment of principal on the $25,000 loan from Henry H. Lindsey as part of his first-year costs. Our calculations of Mr. Shirley's first-year costs include repayments of principal and interest on the Lindsey loan in compliance with the conditions laid down by Mr. Lindsey. In addition, Mr. Shirley has demonstrated that he has sufficient funds to broadcast his "live" programming, compensate a staff of sufficient size to operate his station as proposed and support his family for at least one year without receiving a salary from his proposed FM station. Although Mr. Shirley has not specifically stated what funds will be used to broadcast "live" sports events and religious services, he has allocated $6,801 for "program origination equipment". In addition, he has shown the availability of at least $6,792 in excess of his other predicted first-year expenses, which can be drawn upon if necessary. As for living expenses, most of the excess $6,792 mentioned above can be used if Mr. Shirley finds that his station is not earning any revenues and he does not choose to sell any of his real estate, which he values at $28,000, or his personal property, which he values at $6,000.

11. In its initial pleading of May 5, 1969, Bankhead questioned whether Mr. Shirley's proposed three-member staff would be adequate to operate his station during an 84-hour broadcast week. Mr. Shirley subsequently proposed an increase in the size of his staff from three individuals to six individuals. Although he has stated that he plans to use three fulltime and three parttime employees to staff his station, it is noted that each of the three parttime employees will work 30 hours a week, which qualifies them as fulltime employees under our standards (see Public Notice of April 20, 1971, concerning Annual Employment Form 395). Thus, Mr. Shirley has effectively proposed the use of six fulltime individuals. He includes himself and his wife as fulltime employees, both of whom will work a minimum of 60 hours per week, and his son as a parttime employee; but since none of these persons will receive a salary, it is clear that his allocation of $18,500 for salaries of the other three employees is more than a sufficient amount. If two employees listed as "parttime" employees work 30 hours a week and the other employee works a 40-hour week, at the hourly rate of $2.00, then their salaries would total $10,400 per year. Furthermore, Mr. Shirley has indicated that all regularly employed members of his staff will be required to hold a radio-telephone third-class operator permit with broadcast endorsement, and that he will contract for the services of a radiotelephone first-class operator. It is apparent that all members of Mr. Shirley's staff will be able to perform the routine operation of the transmitter and that a first-class operator will be contracted for on a parttime basis for the transmitter maintenance, in accordance with the Commission's operator requirements (section 73.265 of the rules). We find that Mr. Shirley's proposed staff and the amount allocated for their compensation are reasonable and should assure the effective operation of his proposed station. No basis exists for further exploring the adequacy of his staffing proposal in the hearing process.

12. In view of the foregoing, we find that the petition filed on behalf of the licensee of station WWWF, Fayette, Alabama, fails to raise any substantial and material questions of fact which would warrant designating the above-captioned application for hearing. Furthermore, we have examined the proposal and find that Jesse Willard Shirley is fully qualified to construct and operate his proposed station, and that a grant of his application would serve the public interest, convenience, and necessity.

13. Accordingly, IT IS ORDERED, that the petition filed on behalf of the licensee of station WWWF, Fayette, Alabama, IS DENIED, and that the application of Jesse Willard Shirley (File No. BPH–6672) IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-658

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
SPANISH INTERNATIONAL BROADCASTING CORP.
For Declaratory Ruling Re Special Interest Broadcasting

JULY 19, 1972.

SPANISH INTERNATIONAL BROADCASTING CORP.
c/o McKenna, Wilkinson & Kittner
1150-17th Street, N.W.
Washington, D.C. 20036

GENTLEMEN: This refers to your request filed on your behalf, and on behalf of all independent UHF stations generally, for a declaratory ruling pursuant to section 1.2 of the rules that special interest programming is consistent with the definition of "broadcast service" in section 2.1 of the rules, or, in the alternative, for a waiver of section 2.102(a) of the rules, for a period of two years to permit such programming on a limited basis.

You ask for a declaratory ruling that programming designed for specific business uses such as sales meetings, which you label "special interest", be interpreted as consistent with section 2.1 of the rules, defining "broadcasting service" as transmissions intended for direct reception by the general public. Moreover, you assert that "special interest programming" has been authorized by the Commission and found consistent with the rules. You refer, in this connection, to the rules permitting certain types of subsidiary communications services (SCA) in addition to the usual FM broadcast service, and to Spanish-language programming. However, neither of these is analogous. The SCA operates on a subcarrier of the main FM carrier in a manner that does not disrupt the normal FM programming and is transmitted simultaneously within the station's regularly assigned FM channel.

With respect to Spanish-language programming, the fact that you label language programming as "special interest" does not take it out of the definition of a broadcast service. It is intended for direct reception by the public, whereas your proposed programming is clearly not so intended and is, in fact, point-to-point communication. Your argument in support of your request for waiver rests on the economic plight of independent UHF stations. You allege that independent UHF stations operate for limited hours only because it is not economically feasible to do otherwise. You allege, further, that if permitted to program as proposed, it would result in a more efficient utilization of idle frequency space and would strengthen the economic viability of independent UHF stations.

We are of the view that the proposed programming is not broadcasting and is, therefore, not consistent with the provisions of section 3(o) of the Communications Act and sections 2.1 and 2.106 of the rules. Regarding the plea, in the alternative, for a waiver, we are of the view that you have not shown that a waiver to permit substantial use of broadcast frequencies for non-broadcast purposes would serve the public interest, convenience and necessity. There has been no showing that the proposed operation would increase the amount of programming available to the public or that such operation will contribute in a substantial way to the economic viability of independent UHF stations. Nor have you shown that failure to waive the rules would result in a detriment to the public. Finally, assuming that all of your allegations could be proven in hearing, the Commission would not grant the waiver for the reasons stated. Consequently, a hearing on your request for waiver would serve no useful purpose. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 13 RR 2161.

Accordingly, your request for a ruling declaring your proposed operation consistent with the Communications Act and the Commission's rules, or, in the alternative, for a waiver thereof, IS DENIED.

Commissioner Hooks did not participate.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-646

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO CABLE TELEVISION SYSTEMS AND THE CARRIAGE OF SPORTS PROGRAMS ON CABLE TELEVISION SYSTEMS	Docket No. 19417
and	
In the Matter of APPLICATIONS FOR CERTIFICATES OF COMPLIANCE	CAC-1 through CAC-382

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1972; Released July 26, 1972)

BY THE COMMISSION: COMMISSIONER HOOKS NOT PARTICIPATING.

1. Section 76.17 of the Commission's Rules provides that a timely-filed petition challenging the service proposed in an application for certificate of compliance for cable operations will be acted on in the certificating process. Pursuant to that section, the Commissioner of Baseball has objected to each application placed on public notice to date (for which the time to file an objection has expired), and the National Basketball Association and the National Hockey League both have objected to a large proportion of these applications.

2. The objections do not challenge the service proposed by each applicant, but generally request that the Commission impose a requirement, over and above those cable television regulations which we recently adopted,[1] which would result in prohibiting carriage of an otherwise permissible distant signal when the distant station is carrying a live professional sports event. Because the captioned rule-making proceeding has been instituted to deal specifically with that issue, we feel that the proper forum for disposition of these petitions is in this proceeding where the matter can be dealt with as a whole, and not in the certificating process on a case by case basis. Therefore, we are treating the objections in this proceeding and will not consider them further in the certificating process. Similar objections filed to additional certificate applications will be treated the same way. We believe that this procedure will be equitable to all parties. The Commission has previously stated its intention to conclude this proceeding expeditiously, and final action in this proceeding is expected to be taken before a significant number of new cable television operations

[1] See *Cable Television Report and Order*, FCC 72-108, —— FCC 2d —— (1972).

commence. That final action will in any event govern any such new system operation.

Accordingly, IT IS ORDERED, That the objections described herein, filed on behalf of the Commissioner of Baseball, the National Basketball Association, and the National Hockey League, to the applications for cable television certificates of compliance will be considered in this rule making proceeding and not in connection with particular applications for certification.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-657

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATION FOR ASSIGNMENT OF LICENSES OF STATIONS WOOD AM AND FM, GRAND RAPIDS, MICH., FROM TIME-LIFE BROADCAST, INC., TO WOOD BROADCASTING, INC.	BAL-7396 and BALH-1562

JULY 19, 1972.

WOOD BROADCASTING, INC.,
120 College Avenue, S.E.
Grand Rapids, Mich. 49502

GENTLEMEN: On December 23, 1971, the Commission granted an application for the assignment of licenses of Stations WOOD-AM & FM, Grand Rapids, Michigan, from Time-Life Broadcast, Inc. to WOOD Broadcasting, Inc. (BAL-7396 and BALH-1562). The application was granted subject, however, to the following condition:

This application is granted subject to the condition that within 120 days after grant of the application, Mr. Willard Schroeder will either resign as general manager of WOOD-TV or that the question of the cross-interest created by Mr. Schroeder's employment by WOOD-TV and his ownership of stock in WOOD Broadcasting, Inc. will be resolved.

The question of "cross-interest" exists due to the ownership by Mr. Willard Schroeder of 51% of the stock of the assignee of WOOD-AM-FM and his employment by Time-Life Broadcast, Inc. as General Manager of WOOD-TV also in Grand Rapids. You have advised the Commission that Mr. Schroeder wished to continue as General Manager of WOOD-TV for a period of from 2 to 4 years in order to complete his television broadcasting career (he is 59 years old) and to provide for management continuity during the early tenure of McGraw-Hill, Inc. which had contracted to purchase WOOD-TV from Time-Life. (The acquisition of WOOD-TV by McGraw-Hill was approved by the Commission on March 8, 1972 but the Commission was advised on June 1, 1972 that the sale would not be consummated). In an attempt to cure the "cross-interest" problem created by Mr. Schroeder's conflicting interests in these stations the voting rights to his 51% stock interest in the assignee corporation were placed in a voting trust.

The trust, executed on June 21, 1971, provides that Mr. Michael O. Lareau (owner of 9% of WOOD Broadcasting, Inc. in his own right) will serve as trustee and therefore vote Mr. Schroeder's 51% along with his own 9%. The voting trust has a duration of five years from June 21, 1971, but may terminate at any time prior to the June 21, 1976 termination date if Mr. Schroeder ceases to be general manager of WOOD-TV.

By letter dated and filed with the Commission on January 20, 1972, you contend that the above described voting trust arrangement will sufficiently insulate Mr. Schroeder from the operation of Station WOOD–AM–FM so as to assure compliance with the Commission's "cross-interest" policy and you cite the Commission's ruling in *Alfredo de Arellano III* (FCC 71–1094 letter action released October 21, 1971) where a voting trust was held to have cured a "cross-interest" problem.

Historically, the Commission's "cross-interest policy", designed to insure "arms-length" competition among broadcasting stations, prohibited *any* degree of cross interests in two or more stations in the same service which serve substantially the same market. Thus in *Shenandoah Life Insurance Co.* 19 RR 1 (1959) the Commission held that an individual who was a director of a bank which as trustee held a majority interest in an AM–FM–TV combination, could not become a director of a life insurance company whose wholly-owned subsidiary was the licensee of an AM–FM–TV combination in the same city, even where it was shown that the individual had, nor would have, no connection with the licensee companies. The Commission reasoned that "while it may be true at a given time, no impairment of competition exists in fact, it is the potential of such impairment which the Commission's policy is designed to guard against." (Ibid.) It has been the Commission's belief that such arms-length competition will develop only from separate ownership and management of broadcast stations which compete in the same market.

In some cases where an employment interest at a competing station was limited to "talent" or engineering duties, as opposed to sales or managerial duties, the Commission held that the "cross-interest" policy was not violated. In the *de Arellano* case which you cite the Commission accepted a voting trust arrangement as a means of assuring compliance with our cross-interest policy. There Mr. Arellano, owning 19.9% in television station WRIK–TV, Ponce, Puerto Rico, which under the contract with the 80% owner he was bound not to sell until 1978. He proposed to acquire a minority ownership and to become an officer and director of a corporation (controlled by his father) which had a controlling interest in an AM–FM combination also located in Ponce. He was also to become an officer and director of the AM–FM licensee corporation. In order to avoid conflicts with the Commission's multiple ownership rules and cross-interest policies, Mr. Arellano proposed to place his stock in WRIK–TV in the hands of a voting trustee under an irrevocable trust. The trust would dissolve, however, if the offending interests were disposed of or if the Commission ruled that retention of the interests were permissible. In response to Arellano's request for a declaratory ruling, the Commission approved the voting trust arrangement and stated its view that "this arrangement will insulate you from the operation and control of Station WRIK–TV." The Commission concluded that Arellano's participation in the ownership and control of the broadcast stations owned and operated by his father "does not contravene the Commission's multiple ownership rules."

The Commission is of the view that the *de Arellano* case is distinguishable from the situation here. First of all the interests involved there were both minority interests whereas here Mr. Schroeder's interest is a majority one at the AM and FM and the general manager of the TV. Secondly the trust in *de Arellano* was irrevocable trust so long as he held the conflicting interest or the Commission determined that there was no conflict and the trustee was independent and shared no business interests with Mr. Arellano, whereas here the trust is for a limited duration, and the trustee is a 9% owner and manager of the WOOD–AM–FM stations. Accordingly, after the expiration of the 2 to 4 years during which Mr. Schroeder is entitled to 51% of the profits, he will step into these stations as the controlling owner. While assurances have been made regarding the independence of the trustee here, the Commission is of the view that in these circumstances and in view of the nature of Mr. Schroeder's interests, the potential danger of impairment of arms length competition is such that these interests violate our "cross-interest" policy notwithstanding the voting trust arrangement. Moreover, whatever public interest considerations which may have been present in order to provide for continuity of management of WOOD–TV during the early stewardship of McGraw-Hill, they are not present now since the acquisition of WOOD–TV by McGraw-Hill will not be consummated.

In view of the above, you are advised that Mr. Schroeder's conflicting interests in these stations is violative of the Commission's "cross-interest" policy. Accordingly, Mr. Schroeder must either resign as General Manager of WOOD–TV or divest himself of his interest in WOOD–AM–FM. Please advise the Commission within 60 days of the steps which have been taken to insure compliance with this ruling.

Chairman Burch concurring in the result; Commissioner Hooks not participating.

By Director of the Commission,
Ben F. Waple, *Secretary.*